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IN THE

# Supreme Court of the United States

SEMINOLE TRIBE OF FLORIDA,
*Petitioner,*

v.

FLORIDA HOUSE OF REPRESENTATIVES
AND MARCO RUBIO
*Respondents.*

On Petition for a Writ of Certiorari to the
Supreme Court of Florida

## PETITION FOR WRIT OF CERTIORARI

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## QUESTION PRESENTED

Whether the Florida Supreme Court violated the Indian Commerce Clause and the Supremacy Clause by ruling, based on Florida "policy" and contrary to the express language of the Indian Gaming Regulatory Act and the decisions of a number of United States Circuit Courts of Appeal, that the Governor of Florida lacked authority to agree to tribal operation of banked card games in a tribal-state compact.

## PARTIES TO THE PROCEEDINGS

Pursuant to Rule 14.1(b), the following list represents all parties appearing here and before the Supreme Court of Florida. Petitioner here is the Seminole Tribe of Florida, a federally-recognized Indian tribe. The Tribe joined the suit as a respondent in the Supreme Court of Florida. Petitioners below and respondents here are the Florida House of Representatives and Marco Rubio. Mr. Rubio brought the original petition to the Florida Supreme Court individually and in his capacity as Speaker of the Florida House of Representatives. No longer Speaker of the Florida House, Mr. Rubio is a party here solely in his individual capacity.

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## PETITION FOR WRIT OF CERTIORARI

The Seminole Tribe of Florida petitions for a writ of certiorari to review the decision of the Supreme Court of Florida in *Florida House of Representatives v. Crist.*

## OPINION BELOW

The opinion of the Supreme Court of Florida is reported at 990 So.2d 1035 (Fla. 2008) and appears in the Appendix at 1a-44a. The order of the Supreme Court of Florida denying rehearing is unreported and appears in the Appendix at 45a.

## JURISDICTION

The judgment of the Supreme Court of Florida was entered on July 3, 2008. That court denied a timely motion for rehearing on September 11, 2008. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(a).

## CONSTITUTIONAL AND STATUTORY PROVISIONS

The Indian Commerce Clause provides that "The Congress shall have Power ... To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." U.S. Const. art. I, § 8, cl. 3.

The Supremacy Clause of the United States Constitution provides that:

> "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing is the Constitution or Laws of any State to the Contrary notwithstanding."

U.S. Const. art. VI.

Pertinent provisions of the Indian Gaming Regulatory Act, 25 U.S.C. §§ 2701-2721 (2000), and 18 U.S.C. §§ 1166-1168 (2000), are set out in the Appendix at 46a-62a.

## STATEMENT OF THE CASE

The Indian Gaming Regulatory Act (IGRA), 25 U.S.C. §§ 2701-2721 (2000); 18 U.S.C. §§ 1166-1168 (2000), establishes a framework for regulating Indian gaming. The IGRA creates three classes of Indian gaming, 25 U.S.C. § 2703(6)-(8) (2000). Class III gaming, at issue here, includes house-banked card games, casino games, slot machines, sports betting, pari-mutuel wagering, and lotteries. 25 U.S.C. § 2703(7)(B) (2000); 25 C.F.R. § 502.4 (2008). The IGRA allows Class III gaming activities on tribal lands if such activities are:

(1) authorized under a tribal ordinance or resolution;

(2) "located in a State that permits such gaming for any purpose by any person, organization, or entity"; and

(3) conducted in conformance with a tribal-state compact. 25 U.S.C. § 2710(d)(1) (2000).

The Governor of the State of Florida and the Seminole Tribe of Florida ("the Tribe") entered into a tribal-state gaming compact ("the Compact") pursuant to the IGRA on November 14, 2007. The Compact was federally approved by operation of law under 25 U.S.C. § 2710(d)(8)(C) (2000) and became effective by publication in the Federal Register on January 7, 2008. The execution of this agreement consummated the Tribe's 17-year pursuit of a compact to authorize the conduct of class III casino gaming on the Tribe's lands in Florida under the IGRA.

The Compact allows the Tribe to offer specified Class III gaming, including slot machines as well as high-stakes poker and banked card games such as blackjack and baccarat, at its currently existing casinos.[1] In exchange for partial exclusivity, the State receives substantial payments from the Tribe that increase at specified thresholds, based upon a percentage of tribal gaming revenue.

Five days after the Compact's execution, on November 19, 2007, the Florida House of Representatives and its Speaker, Marco Rubio, petitioned the Supreme Court of Florida for a writ of quo warranto alleging that the Governor lacked authority to bind the State to an IGRA compact

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[1] An excerpt of the Compact containing the scope of gaming provisions appears in the Appendix at 66a-67a.

absent approval or ratification by the Florida Legislature.[2]

The Tribe and the Governor, in separate response briefs, argued that the Compact was negotiated and executed by the Governor within the scope of his constitutional duties to faithfully execute the law.[3] The Compact did not make new law, create any new agencies, assign any duties to existing agencies not already authorized by law, waive the State's sovereign immunity, allocate state funds, or otherwise encroach upon any exclusive function of the Florida Legislature. Consequently, no legislative approval was required.

The Tribe further pointed out that Florida gambling law permits the Florida Lottery to operate banked card games and other casino games. The Florida Lottery has in the past offered several casino-style games of chance and gaming devices, including a roulette-type wheel, a house-banked card game and a dice game. Although the Florida Lottery does not

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[2] The Petition for a Writ of Quo Warranto requested issuance of a writ directing the Governor to justify his authority and to issue any order necessary to "clarify that the Compact is not binding and enforceable unless and until it is ratified by the Legislature." Pet. Writ Quo Warranto at 6. The Petition further requested that the writ "declar[e] that legislative authorization or ratification is necessary for any compact governing gaming on Indian lands to be valid in this State." *Id.* at 27.

[3] *See* the Seminole Tribe of Florida's Response in Opposition to Petition for Writ of Quo Warranto (hereinafter "Tribe's Response Brief") at 34; and the Response of Governor Crist in Opposition to the Petition for Writ of Quo Warranto (hereinafter "Governor's Response brief") at 32 & 34.

currently offer those casino games, it has retained full statutory authority do so. See Tribe's Response Brief at 33-34. Because IGRA § 2710 makes lawful class III gaming activities "located in a State that permits such gaming for any purpose by any person, organization or entity," 25 U.S.C. § 2710(d)(1)(B) (emphasis added), the Tribe further argued that the gaming authorized by the Compact is fully consistent with the IGRA. *See* Tribe's Response Brief at 24-35.

The Supreme Court of Florida issued an opinion on July 3, 2008. The court concluded that one lone provision of the Compact, which authorized the play of blackjack and other banked card games, violated Florida criminal law. By agreeing to the provision, the court found the Governor to have acted beyond his constitutional authority. It wrote:

> "Enacting laws – and especially criminal laws – is quintessentially a legislative function. . . . The Governor's action therefore encroaches on the legislative function and was beyond his authority. . . . Neither the Governor nor anyone else in the executive branch has the authority to execute a compact that violates state criminal law."

*Florida House of Representatives v. Crist*, 990 So.2d 1035, 1050 (Fla. 2008) (internal citations omitted) (Appendix at 29a).

While acknowledging that the State permits a wide array of Class III gaming, and even noting that the constitution "authorizes the state lottery, which offers various Class III games," *id.* at 1049, the court

expressed no view nor made any mention of the Tribe's argument that Florida law authorizes the Lottery to offer the lawful play of banked card games.[4]

The Tribe requested rehearing on the ground that the court made an error of law in applying an improper test as to what gaming is permissible on the Tribe's Indian lands located in Florida pursuant to 25 U.S.C. § 2710(d)(1)(B). The Tribe also urged rehearing given the error of the Florida Supreme Court's factual analysis. The court found banked card games to be completely prohibited in Florida even though the Tribe provided description, photographic evidence and a state court order[5]

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[4] The court ignored the Tribe's argument and avoided the question posed under its quo warranto jurisdiction: whether the governor has authority to enter into an IGRA compact, without legislative ratification. The court stated:

> "Whether the Compact violates IGRA, however, is a question we need not and do not resolve. Given our narrow scope of review on a writ of quo warranto, the issue here is only whether the Florida Constitution grants the Governor the authority to unilaterally bind the State to a compact that violates public policy. We conclude that even if the Governor is correct that IGRA permits the expansion of gaming on tribal lands beyond what state law permits, such an agreement represents a significant change in Florida's public policy. It is therefore precisely the type of action particularly within the Legislature's power."

*Id.* at 1050; Appendix at 28a-29a.

[5] *Seminole Tribe of Florida v. Chiles*, No. 97-014171 (Fla. Broward County Cir. Ct., Dec. 18, 1998). *See* Appendix F.

related to the banked card games operated by the Florida Lottery on its "Flamingo Fortune" television show. The court never addressed this factual evidence, which demonstrated that banked card games are permitted in Florida when operated by the Florida Lottery for the purpose of state revenue generation. *See* The Seminole Tribe of Florida's Motion for Rehearing (hereinafter "Tribe's Rehearing Brief") at 2-6.

The Tribe's motion for rehearing was denied without discussion on September 11, 2008, with Justice Lewis dissenting.

## REASONS FOR GRANTING THE WRIT

In determining that one provision of the Compact violates the criminal law and public policy of Florida and that the Governor of Florida lacked authority to agree to that provision, the Supreme Court of Florida ignored controlling provisions of Section 2710 of the IGRA which preempt state law under the Indian Commerce Clause[6] and the Supremacy Clause.[7] This ruling directly conflicts with the decisions of the Courts of Appeal for the

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[6] U.S. Const. art I, § 8, cl. 3; *see, e.g., Montana v. Blackfeet Tribe*, 471 U.S. 759, 764 (1985) ("The Constitution vests the Federal Government with exclusive authority over relations with Indian tribes" (citing U.S. Const. art. I, § 8, cl. 3, *Oneida Indian Nation v. County of Oneida*, 414 U.S. 661, 670 (1974), and *Worcester v. Georgia*, 6 Pet. 515, 561 (1832)).

[7] U.S. Const. art. VI, § 2; *see, e.g., Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 248 (1984).

Second, Eighth and Ninth Circuits[8] interpreting Section 2710 of the IGRA and, through this error, deprives the Seminole Tribe of Florida of fundamental rights provided by federal law. In addition to its effect on the Tribe, resolution of this conflict is of national importance because more than 25 tribal-state compacts presently in effect will expire at various times over the next five years and more than 100 compacts are subject to modification while in effect.[9] In a few states, such as Florida, Texas and Alabama, tribes have not been able to achieve compacts under the IGRA. The erroneous decision of the Florida Supreme Court could be relied upon by other states in future tribal-state compact negotiations under the IGRA in conflict with the decisions of the federal Circuit Courts of Appeal cited above. This Court should grant review to resolve this conflict in order to protect the federal rights of tribes.[10]

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[8] *Mashantucket Pequot Tribe v. State of Connecticut*, 913 F.2d 1024, 1031 (2d Cir. 1990); *United State v. Sisseton-Wahpeton Sioux Tribe*, 897 F.2d 358, 365 (8th Cir. 1990); *Rumsey Indian Rancheria of Wintun Indians v. Wilson*, 64 F.3d 1250, 1258, 60 (9th Cir. 1994).

[9] See Appendix I (70a-77a) for a list of compacts in effect that will expire and need to be renegotiated.

[10] This Court has granted certiorari where a decision of the highest court in a state conflicts with the decision of a federal appellate court regarding a federal question. *See, e.g., Baldwin v. Alabama*, 472 U.S. 372, 374 (1985); *Andresen v. Maryland*, 427 U.S. 463, 470 n.5 (1976).

## I. The decision contradicts the settled interpretation of IGRA § 2710.

### A. Gaming permitted "for any purpose by any person, organization, or entity" under § 2710(d)(1)(B).

Under the IGRA, a tribe is authorized to enter into a compact with a state regarding the conduct of gaming on its lands for gaming activity permitted by the state "for any purpose by any person, organization, or entity." 25 U.S.C. § 2710(d)(1)(B) (emphasis added).[11] While the federal appellate courts are divided as to whether the phrase "such gaming" refers to the general class of games[12] or specific types of games,[13] all consistently look beyond the letter of the state's law in order to examine what the State actually allows to determine whether such gaming is "permitted." *See, e.g., Rumsey Indian Rancheria,* 64 F.3d at 1258-60 (finding the "plain meaning of the word 'permit' to be unambiguous," the court remanded to the district court to determine "whether California permits the operation of slot

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[11] It is undisputed that the question of what gaming activity is permitted in a tribal-state compact is a question of federal law. *See Mashantucket Pequot Tribe v. Connecticut*, 913 F.2d 1024, 1029-1032 (2d Cir. 1990); *Yavapai-Prescott Indian Tribe v. State of Ariz.*, 796 F.Supp. 1292, 1295-96 (D.Ariz.1992); *Lac du Flambeau Band of Lake Superior Indians v. Wis.*,770 F.Supp. 480 (W.D.Wis. 1991), *appeal dismissed*, 957 F.2d 515 (7th Cir.1992); *cf. United States v. Sisseton-Wahpeton Sioux Tribe*, 897 F.2d 358, 365 (8th Cir.1990).

[12] *Northern Arapaho Tribe v. Wyoming*, 389 F.3d 1308 (10th Cir. 2004); *Mashantucket Pequot*, 913 F.2d 1024; and *Lac du Flambeau*, 770 F.Supp. 480.

[13] *Rumsey Indian Rancheria*, 64 F.3d 1250, and *Cheyenne River Sioux Tribe v. State of South Dakota*, 3 F.3d 273 (8th Cir. 1993).

machines in the form of the state lottery or otherwise"); *Mashantucket Pequot*, 913 F.2d at 1031 (affirming the district court's conclusion "after a careful review of pertinent Connecticut law... that Connecticut permits games of chance, albeit in a highly regulated form"); *Cheyenne River Sioux Tribe*, 3 F.3d at 279 ("The 'such gaming' language of 25 U.S.C. § 2710(d)(1)(B) does not require the state to negotiate with respect to forms of gaming it does not presently permit"); *cf. Sisseton-Wahpeton*, 897 F.2d at 365 (discussing the identical phrase in the class II provisions of IGRA as follows: "The phrase 'for any purpose by any person, organization or entity' makes no distinction between State laws that allow class II gaming for charitable, commercial, or governmental purposes, or the nature of the entity conducting the gaming. If such gaming is not criminally prohibited by the State in which tribes are located, then tribes, as governments, are free to engage in such gaming").

**B. The Florida Supreme Court never examined pertinent provisions of Florida law that "permit" the Florida Lottery to conduct banked card games.**

The Governor and the Tribe entered into a compact, which authorized banked card games based on the reasonable interpretation that, under IGRA § 2710(d)(1)(B), Florida law permits those games, since those games are permitted to the Florida Lottery. Nothing in the Lottery's implementing statute or other provision of law limits the authority of the Florida Lottery to establish lottery games that use casino card games as the method of selecting prize winners. The Florida Lottery has operated banked

card games in the past. The Florida Lottery's "Million Dollar Flamingo Fortune" television show featured several casino-style games of chance and gaming devices, including a roulette-type wheel, a house-banked card game and a dice game.

The games offered by the Lottery on the show were the subject of a declaratory judgment action brought by the Tribe. On December 18, 1998, the Broward County Circuit Court held that the Florida State Lottery was engaged in operating certain casino-type games on its Lottery television show that "constitute games which, if conducted by any person, organization or entity, other than the [Florida Lottery], would constitute gambling in violation of Florida Statute Section 849.01." *Seminole Tribe of Florida v. Chiles*, No. 97-014171 (Fla. Broward County Cir. Ct., Dec. 18, 1998) (Appendix F).

Although possessing the undisputed power to do so, the Florida Legislature has never interfered with the Florida Lottery's ability to offer banked casino card games in order to generate revenue for the State, by amending, retracting or otherwise limiting the broad statutory authority that it gave to the Lottery.

Yet, in conflict with the IGRA determinations of the federal appellate courts noted above and this Court's statement in *California v. Cabazon Band of Mission Indians*, the Florida Supreme Court never examined the applicable state laws. 480 U.S. 202, 211 n. 10 (1987) ("The applicable state laws governing an activity must be examined in detail before they can

be characterized as regulatory or prohibitory.")[14] The Florida Supreme Court, however, never even considered the State Lottery's authorization to conduct banked card games. Instead, the court made its decision based upon the erroneous understanding that the State's official posture regarding banked card games was universally prohibitory.

The Florida Supreme Court's evasion of these facts frustrates the purpose of the IGRA and must be rejected. *See Stein v. New York*, 346 U.S. 156, 181 (1953) ("this Court cannot allow itself to be completely bound by state court determination of any issue essential to decision of a claim of federal right, else federal law could be frustrated by distorted fact finding"). Here, the Florida Supreme Court assumed that banked card games are completely prohibited by state law without considering the statutory authorization that permits the Lottery to offer the exact banked card games that are supposedly prohibited. The determination as to whether the Lottery may offer such games is a central issue. Once it is acknowledged that Florida law permits the Lottery to offer banked card games, under IGRA § 2710 the Seminole Tribe of Florida is entitled to offer

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[14] The Court pointed out: "The lower courts have not demonstrated an inability to identify prohibitory laws. For example, in *United States v. Marcyes*, 557 F.2d 1361, 1363-1365 (CA9 1977), the Court of Appeals adopted and applied the prohibitory/regulatory distinction in determining whether a state law governing the possession of fireworks was made applicable to Indian reservations by the Assimilative Crimes Statute, 62 Stat. 686, 18 U.S.C. § 13. The court concluded that, despite limited exceptions to the statute's prohibition, the fireworks law was prohibitory in nature."

such games on its tribal lands pursuant to a tribal-state compact.

**II. The Florida Supreme Court's decision is based upon a fundamental error of federal law regarding state jurisdiction over gaming conducted on Indian lands.**

It is not open to dispute that prior to the enactment of the IGRA, states had no role in the regulation of Indian gaming. *See Cabazon*, 480 U.S. at 202. Even though Congress, through Public Law 83-280, codified as 18 U.S.C. § 1162 (2000) and 28 U.S.C. § 1360 (2000), permitted certain states (including Florida) to exercise criminal jurisdiction and limited civil jurisdiction over tribes, that grant of jurisdiction did not extend to state regulation of Indian gaming activities. *See Seminole v. Butterworth*, 658 F.2d 310, 313-15 (5th Cir. 1981) (because P.L. 280 permits states to enforce only their criminal-prohibitory laws, states have no role to play with respect to civil-regulatory matters, such as gambling activities that are regulated, but not criminally prohibited, by the State of Florida) (citing *Bryan v. Itasca County*, 426 U.S. 373 (1976)).

The IGRA entirely preempts state regulation of Class I and II Indian gaming and only provides an opportunity for states to participate in the regulation of Class III gaming through the tribal-state compact process.[15]

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[15] States are not allowed by IGRA to regulate Classes I and II. 25 U.S.C. § 2710(a) (2000) (Class I gaming is within the exclusive jurisdiction of the Indian tribes. Class II gaming is within the exclusive jurisdiction of the Indian tribes, but subject

The Florida Supreme Court veered totally off course when it reasoned that "what is legal in Florida is legal on tribal lands, and what is illegal in Florida is illegal there." *Florida House of Representatives*, 990 So.2d at 1048 (Appendix at 25a). The Florida Supreme Court cited 18 U.S.C. § 1166(a) for the proposition that "federal law provides that, except as provided in a tribal-state compact, state gambling laws apply on tribal lands." *Id.* Yet, that provision of the IGRA only specifies that state law will apply "for purposes of Federal law" where the gaming at issue is not a form of gambling authorized by the IGRA. State gambling laws never directly apply to Indian lands.

If the Florida Supreme Court's analysis were correct, then tribes would not be permitted to conduct high stakes bingo where state law allows only low stakes bingo. The fact that the activity is "illegal" for state citizens does not control the result under the IGRA.

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to federal regulation under IGRA). States may regulate Class III only through a tribal-state compact. 25 U.S.C. § 2710(d)(3)(C)(2000). *See Florida v. Seminole Tribe of Florida*, 181 F.3d 1237, 1247 (11th Cir. 1999) ("The legislative history of IGRA indicates that Congress, in developing a comprehensive approach to the controversial subject of regulating tribal gaming, struck a careful balance among federal, state, and tribal interests. A central feature of this balance is IGRA's thoroughgoing limits on the application of state laws and the extension of state jurisdiction to tribal lands") (internal citations omitted); *see also Gaming Corp. of America v. Dorsey & Whitney*, 88 F.3d 536, 546-47 (8th Cir. 1996) ("Congress left the states without a significant role under IGRA unless one is negotiated through a compact").

With respect to Class III gaming, similar considerations apply. The fact that state law prohibits various forms of casino gaming to its citizens, but allows them for charities, means that it "permits" those forms of gaming for some persons. Tribes are therefore entitled to offer those games, under a compact, even though they would be illegal if state law applied directly to tribal gaming activities. *See Mashantucket Pequot*, 913 F.2d at 1031 (if an Indian tribe were required to conduct such gaming only according to state law and regulations, "[t]he compact process that Congress established as the centerpiece of the IGRA's regulation of class III gaming would thus become a dead letter; there would be nothing to negotiate, and no meaningful compact would be possible").

The scope of gaming authorized under the IGRA, as discussed above, is not the same scope of gaming authorized to commercial entities under state law, but is such gaming as is permitted "for any purpose by any person, organization or entity." Given its statutory intent for tribal gaming to "promot[e] tribal economic development, self-sufficiency and strong tribal governments,"[16] the IGRA expressly authorizes a competitive advantage for tribal gaming on Indian lands over commercial gaming on state lands. The United States Solicitor General explained the effect as follows:

> "IGRA's compacting process affords reciprocal protection for the significant governmental

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[16] 25 U.S.C. § 2702(1) (2000).

> interests of Tribes by requiring the States to negotiate over a form of Class III gaming as long as the State permits it 'for any purpose by any person.' That provision enables a Tribe to negotiate terms and conditions different (and more favorable) than those applicable to non-Indian gaming operators under state law for any Class III gaming activities that the State, after weighing its own public policies, has not seen fit to outlaw entirely."

Brief of Amicus Curiae United States, Office of the Solicitor General, at 11-12, *Sycuan Band of Mission Indians v. Wilson*, 521 U.S. 1118 (1997) (No. 96-1059) (emphasis added).

Contrary to the Supreme Court of Florida's conclusion, the scope of gaming under the IGRA is not defined by a simplistic and forced assimilation of state law definitions. *See Sisseton-Wahpeton*, 897 F.2d at 366 n.10; *Mashantucket Pequot*, 913 F.2d at 1030-31. Rather, pursuant to the IGRA, state gambling laws, like tribal laws, are subjects of negotiation and upon mutual agreement of the parties, may be included in the compact when "directly related to, and necessary for, the licensing and regulation of such activity." 25 U.S.C. § 2710(d)(3)(C).

**III. The Governor's execution of the Compact that authorizes banked card games on Indian lands neither intrudes upon legislative authority nor changes the public policy of Florida.**

**A. The Governor has performed a typical executive function – rendering a decision based on existing policy.**

The Governor's execution of the Compact did not render any change in the public policy of the State of Florida. The question of what games Florida "permits" for the purpose of gaming on Indian lands pursuant to a tribal-state compact under the IGRA has no bearing upon the Legislature's authority to make fundamental policy decisions regarding gambling law applicable to state lands.

Under the IGRA, the scope of gaming is determined in part on the state law in place at the time. *See Coeur d'Alene Tribe v. State,* 842 F.Supp 1268 (D. Idaho 1994). The Governor and the Tribe entered into a compact, which included banked card games, based on the conclusion that existing Florida law permits the Florida Lottery to offer those games.

The Governor has not engaged in unconstitutional policy making as he has in no way changed state gambling law or policy. The decision of Governor Crist resembles a determination made by the Governor of Wisconsin related to Indian gaming under the IGRA found by the Seventh Circuit to be constitutional. *Lac Courte Oreilles Band v. Wisconsin*, 367 F.3d 650 (7th Cir. 2004). There, several tribes questioned the governor's

constitutional authority to concur with the Secretary of Interior on an off-reservation gaming proposal. The court upheld the governor's authority reasoning that:

> "the Governor's decision regarding any particular proposal is not analogous to creating Wisconsin gaming policy wholesale – a legislative function – but rather is typical of the executive's responsibility to render decisions based on existing policy."

*Id.* at 664.

In *Lac Courte Oreilles*, the Seventh Circuit also pointed out that the legislature had its own authority to place a check on the governor's power to concur and attempted to do so by enacting legislation. *Id.* Similarly, the Florida Legislature possesses the power to limit the Governor's authority to execute through the legislative process.[17] The Legislature's inaction triggered a fundamental disagreement between the majority of the Florida Supreme Court and the concurring opinion of Justice Lewis. Justice Lewis stated that the necessary business clause of the Florida Constitution "does afford the Governor a field of operation to enter into a binding compact under circumstances in which the other branches of government have ignored a problem or neglected to act and thereby created a void by governmental inaction..." *Florida House of Representatives*, 990

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[17] *See, e.g., Florida House of Representatives*, 990 So.2d at 1043 (discussing the Legislature's law-making action in several compacts entered into and ratified by the State) (Appendix at 13a-14a).

So.2d at 1051 (Lewis, J., concurring) (Appendix at 32a). Justice Lewis pointed out that even though "the Tribe actively sought to negotiate resolution of a compact for almost sixteen years, the Legislature – having full access to the information and issues – did not act." *Id.*

Not only could the Florida Legislature have taken action to define the Governor's role in the compact process, lawmakers could have eliminated the Tribe's right to conduct banked card games under the IGRA. The Florida Legislature could have enacted prohibitory laws in a comprehensive manner that would not be subject to exception and would make such games unavailable for compacting under the IGRA.

In other states, constitutional and statutory limitations upon the state lotteries, which are not present in Florida, have been deemed grounds to limit the scope of gaming available for class III gaming under the IGRA. For example, after tribes in Idaho requested compacts to conduct class III casino games, including slot machines and banked card games based on the breadth of gaming permitted under the state constitution to the Idaho lottery, Idaho amended its constitution. *See Coeur d'Alene Tribe v. State*, 842 F.Supp. 1268, 1269 (D. Idaho 1994). The amended Idaho constitution expressly prohibited the state-run lottery from offering casino-type gaming and stated as follows: "No activities permitted by subsection (1) shall employ any form of casino gambling including, but not limited to, blackjack, craps, roulette, poker, bacarrat [baccarat], keno and slot machines." Idaho Const. art. III, Sec.

20(2) (amended 1992). The district court concluded that because Idaho gambling policy changed to prohibit such gaming by the state lottery prior to the state entering into compacts with the tribes, under the IGRA, the tribes could not offer such gaming. *Coeur d'Alene*, 842 F.Supp. at 1283.

In order to circumscribe its state lottery from offering casino card games, the Montana Legislature defined "lottery game" to exclude "card games." *See* Mont. Code Ann. § 23-7-103(4). As a result, pursuant to the IGRA, the Ninth Circuit concluded that tribes in Montana were not permitted to offer casino card games. *See Crow Tribe of Indians v. Racicot*, 87 F.3d 1039 (9th Cir. 1996). Like Montana, in Florida, the Legislature itself has authority to modify the Florida Lottery statute in order to prohibit the Lottery from offering banked card games. The Florida Legislature, however, has not done so. As a result, for this and other reasons, in Florida banked card games are a permitted type of gaming for inclusion in a tribal-state compact under the IGRA.

**B. Federal law limits state legislative authority regarding gaming conducted on Indian lands.**

Not only is the Compact consistent with public policy in Florida, but the gaming activities allowed under the Compact may be conducted only on Indian lands in a manner consistent with the IGRA. The Florida Supreme Court greatly overreaches when suggesting that the authorization of the play of banked card games on the Tribe's Indian lands is "precisely the type of action particularly within the Legislature's power." *Florida House of*

*Representatives*, 990 So.2d at 1050 (Appendix at 29a). Federal law clearly limits a state legislature's role with respect to what gaming may be conducted on Indian lands under a tribal-state compact. *See Dorsey*, 88 F.3d at 547 (the IGRA has the "requisite extraordinary preemptive force" necessary to completely preempt state law).

The Compact's authorization of gaming activities consistent with the IGRA in no way alters Florida public policy as no entity other than the Tribe has been affected and the gaming activities are restricted to tribal lands where the state has no policy role. In no way has the Governor's action modified the Florida Lottery's authorization to offer banked card games nor has commercial gaming been expanded or restricted. Although the exclusivity provisions in the Compact establish financial incentives to encourage the State to limit the expansion of gambling in Florida, such terms do not preclude the Florida Legislature from making the policy choice to further expand gaming. *See, e.g., Yavapai-Prescott Tribe,* 796 F.Supp. at 1297 ("If gaming is such an economic panacea, the State's public policy may change. The State could legalize gaming, compete for the gaming dollar, and make it unnecessary or less attractive for non-Indians to go to tribal facilities.")

## CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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# APPENDIX

APPENDIX A: *Florida House of Representatives v. Crist*, 990 So. 2d 1035 (Fla. 2008)
(Supreme Court of Florida – Opinion Below)

Supreme Court of Florida.
FLORIDA HOUSE OF REPRESENTATIVES, et al.,
Petitioners,
v.
The Honorable Charles J. CRIST, Jr., etc.,
Respondent.
No. SC07-2154.
July 3, 2008.

CANTERO, J.

After almost sixteen years of sporadic negotiations with four governors, in November 2007 the Seminole Indian Tribe of Florida signed a gambling "compact" (a contract between two sovereigns) with Florida Governor Charles Crist. The compact significantly expands casino gambling, also known as "gaming," on tribal lands. For example, it permits card games such as blackjack and baccarat that are otherwise prohibited by law. In return, the compact promises substantial remuneration to the State.

The Florida Legislature did not authorize the Governor to negotiate the compact before it was signed and has not ratified it since. To the contrary, shortly after the compact was signed, the Florida House of Representatives and its Speaker, Marco Rubio, filed in this Court a petition for a writ of quo warranto disputing the Governor's authority to bind the State to the compact. We have exercised our

discretion to consider such petitions, *see* art. V, § 3(b)(8), Fla. Const., and now grant it on narrow grounds. We hold that the Governor does not have the constitutional authority to bind the State to a gaming compact that clearly departs from the State's public policy by legalizing types of gaming that are illegal everywhere else in the state.

In the remainder of this opinion, we describe the history of Indian gaming compacts in general and the negotiations leading up to the compact at issue. We then explain our jurisdiction to consider the petition. Finally, we discuss the applicable constitutional provisions, statutes, and cases governing our decision.

## I. THE FACTUAL AND LEGAL BACKGROUND

We analyze the compact in the context of the federal regulations authorizing it as well as the background of the negotiations in this case. We first review the statutory foundation for the compact: the Indian Gaming Regulatory Act, 25 U.S.C. §§ 2701-2721 (2000) (IGRA). Next, we detail the history of the Tribe's attempts to negotiate a compact with the State. Finally, we explain the compact's relevant terms.

### A. IGRA

Indian tribes are independent sovereigns. The Indian Commerce Clause of the United States Constitution grants only Congress the power to override their sovereignty on Indian lands. U.S. Const., art. I, § 8, cl. 3 ("The Congress shall have

Power ... [t]o regulate Commerce with ... the Indian Tribes."); *see also California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 207, 107 S.Ct. 1083, 94 L.Ed.2d 244 (1987) (noting that tribal sovereignty is subordinate only to the federal government). Before IGRA, states had no role in regulating Indian gaming. *See Cabazon*, 480 U.S. at 202, 107 S.Ct. 1083.

Congress enacted IGRA in 1988. Among other things, the statute provides "a statutory basis for the operation of gaming by Indian tribes as a means of promoting tribal economic development, self-sufficiency, and strong tribal governments." 25 U.S.C. § 2702(1). IGRA divides gaming into three classes: Class I includes "social games solely for prizes of minimal value." *Id.* § 2703(6). Class II includes "the game of chance commonly known as bingo" and "non-banked" card games-that is, games in which participants play against only each other; the host facility (the "house") has no stake in the outcome. *Id.* § 2703(7). Class III-the only type relevant here-comprises all other types of gaming, including slot machines, pari-mutuel wagering (such as horse and greyhound racing), lotteries, and "banked" card games-such as baccarat, blackjack (twenty-one), and chemin de fer-in which participants play against the house. *Id.* § 2703(6)-(8).

IGRA permits Class III gaming on tribal lands, but only in limited circumstances. It is lawful only if it is (1) authorized by tribal ordinance, (2) "located in a State that permits such gaming for any purpose by any person, organization, or entity," and (3) "conducted in accordance with a Tribal-State compact

entered into by the Indian tribe and the State ... that is in effect." *Id.* § 2710(d)(1) (emphasis added).

IGRA provides for tribes to negotiate compacts with their host states. Upon a tribe's request, a state " shall negotiate with the Indian tribe in good faith to enter into such a compact." *Id.* § 2710(d)(3)(A) (emphasis added). If the parties successfully negotiate a compact and the Secretary of the Department of the Interior (Department) approves it, the compact takes effect "when notice of approval by the Secretary" is published in the Federal Register. *Id.* § 2710(d)(3)(B), (8).

If negotiations fail, IGRA allows a tribe to sue the state in federal court. If the state continues to refuse consent, the Secretary may "prescribe ... procedures" permitting Class III gaming. *See id.* § 2710(d)(7)(B)(vii). The United States Supreme Court has held, however in a case involving the Seminole Tribe's attempts to offer Class III gaming in Florida that IGRA did not abrogate the states' Eleventh Amendment immunity. *See Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 47, 116 S.Ct. 1114, 134 L.Ed.2d 252 (1996). Therefore, states need not consent to such lawsuits. The Department later created an alternative procedure under which, when a tribe cannot negotiate a compact and a state asserts immunity, the Secretary may prescribe Class III gaming. *See* Class III Gaming Procedures, 64 Fed.Reg. 17535-02 (Apr. 12, 1999) (codified at 25 C.F.R. pt. 291 (2007)). At least one federal court, however, has held that the Secretary lacked authority to promulgate such regulations. *See Texas v. United States*, 497 F.3d 491, 493 (5th Cir.2007),

*petition for cert. filed sub nom. Kickapoo Traditional Tribe of Texas v. Texas*, 76 U.S.L.W. 3471 (U.S. Feb. 25, 2008) (No. 07-1109). Therefore, their validity remains questionable.

B. The Negotiations Between the Tribe and the State

With this statutory framework in mind, we briefly describe the protracted history of the Seminole Tribe's efforts to negotiate a compact for conducting Class III gaming in Florida. These negotiations spanned sixteen years and four different governors.

The Seminole Indian Tribe is a federally recognized Indian tribe whose reservations and trust lands are located in the State. The Tribe currently operates Class II gaming facilities, offering low stakes poker games and electronically aided bingo games. The Tribe first sought a compact allowing it to offer Class III gaming in 1991. That January, the Tribe and Governor Lawton Chiles began negotiations, but they ultimately proved fruitless. That same year, the Tribe filed suit in federal court alleging that the State had failed to negotiate in good faith. As noted earlier, the Supreme Court ultimately ruled that the State could assert immunity, and it did. *See Seminole Tribe*, 517 U.S. at 47, 116 S.Ct. 1114, *aff'g Seminole Tribe of Fla. v. Fla.*, 11 F.3d 1016 (11th Cir.1994).

Over the next several years, the Tribe repeatedly petitioned the Depar ment to establish Class III gaming procedures. In 1999, the Department did so. It found the Tribe eligible for the

procedures and called an informal conference, which was held in Tallahassee that December. At the State's suggestion, however, the Tribe agreed to suspend the conference, though only temporarily. In January 2001, the Secretary issued a twenty-page decision allowing the Tribe to offer a wide range of Class III games. When the State requested clarification, however, the Secretary withdrew the decision. The delay continued. Finally, five years later-in May 2006-the Department reconvened the conference in Hollywood, Florida, and in September of that year warned that if the Tribe and the State did not execute a compact within 60 days, the Department would issue Class III gaming procedures. Despite the parties' failure to negotiate a compact, however, the Department never issued procedures.

Apparently exasperated with the slow progress of the procedures, in March 2007 the Tribe sued the Department in federal court. *See Seminole Tribe of Fla. v. United States*, No. 07-60317-CIV, 2007 WL 5077484 (S.D. Fla. filed Mar. 6, 2007). The Department then urged Governor Crist to negotiate a compact, warning that if a compact was not signed by November 15, 2007, the Department would finally issue procedures. Under the proposed procedures, the State would not receive any revenue and would have no control over the Tribe's gaming operations. The Tribe would be authorized to operate slot machines and "card games," defined as "a game or series of games of poker (other than Class II games) which are played in a nonbanking manner." (Emphasis added.) Notably, the alternative procedures would not have

permitted the Tribe to operate banked card games such as blackjack.[1]

On November 14-the day before the deadline-the Governor agreed to a compact with the Tribe (Compact). Five days later, the House and its Speaker, Marco Rubio, filed this petition disputing the Governor's authority to bind the State to the Compact without legislative authorization or ratification. We allowed the Tribe to join the action as a respondent.[2]

On January 7, 2008, upon publication of the Secretary's approval, the Compact went into effect. *See* Notice of Deemed Approved Tribal-State Class III Gaming Compact, 73 Fed.Reg. 1229 (Jan. 7, 2008). The parties agree, however, that the Secretary's approval does not render the petition moot.[3]

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[1] During this period, two separate but identical bills designating the Governor to negotiate and execute a compact and submit it for ratification by the legislature were not voted on by the House of Representatives. *See* Fla. SB 160 (2007); Fla. HB 209 (2007).

[2] We also allowed other organizations to file briefs as amici curiae in support of the House: the Florida Senate, the Gulfstream Park Racing Association, and the City of Hallandale Beach.

[3] The federal district court, however, concluded that such approval did render the Tribe's suit moot. *Seminole Tribe of Fla. v. United States*, No. 07-60317-CIV (S.D. Fla. order filed June 20, 2008). The court dismissed the Tribe's case and noted that the Tribe already had begun operating under the Compact's terms.

## C. The Compact

The Compact recites that the Governor "has the authority to act for the State with respect to the negotiation and execution of this Compact." It covers a period of twenty-five years and allows the Tribe to offer specified Class III gaming at seven casinos in the State. It establishes the terms, rights, and responsibilities of the parties regarding such gaming. We discuss only its more relevant provisions.

The Compact authorizes the Tribe to conduct "covered gaming," which includes several types of Class III gaming: slot machines; any banking or banked card game, including baccarat, blackjack (twenty-one), and chemin de fer; high stakes poker games; games and devices authorized for the state lottery; and any new game authorized by Florida law. The Compact expressly does not authorize roulette- or craps-style games. The gaming is limited to seven casinos on tribal lands in six areas of the state: Okeechobee, Coconut Creek, Hollywood (two), Clewiston, Immokalee, and Tampa. Compact pt. IV.B., at 7-8.

The Compact grants the Tribe the exclusive right to conduct certain types of gaming. That is, the Tribe may conduct some Class III gaming, such as banked card games, that is prohibited under state law. Based on that "partial but substantial exclusivity," the Tribe must pay the State a share of the gaming revenue. That share is based in part on amounts that increase at specified thresholds: when the Compact becomes effective, the State receives $50 million. Over the first twenty-four months of

operation, it will receive another $175 million. Thereafter, for the third twelve months of operation the State will receive $150 million, and for each twelve-month cycle after that, a minimum of $100 million. If the State breaches the exclusivity provision, however-by legalizing any Class III gaming currently prohibited under state law-the Tribe may cease its payments. The Compact (attached as an appendix to this opinion) is thirty-seven pages long and contains several other provisions we need not detail here.[4]

## II. JURISDICTION

Before discussing the issue presented, we first address our jurisdiction. The House and Speaker Rubio have filed in this Court a petition for writ of

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[4] For example, Part V provides that the Tribe will establish rules, regulations, and minimum operational requirements of gaming facilities under the Compact. The "State Compliance Agency"-which is earlier defined as "the Governor or his designee unless and until an SCA has been designated by the Legislature," *see* Compact at 7-"may propose additional rules and regulations consistent with and related to the implementation of this Compact...." Compact at 9. In addition, "the State may secure an annual independent financial audit of the conduct of Covered Games subject to this Compact," may request meetings with the Tribe regarding the audit, and may select the independent auditor. Compact at 11-12. Part VI addresses tort claims and remedies for patrons and provides that employee claims will be addressed under the Tribe's workers' compensation regulation. Compact at 15. Part VII places regulation of the activities governed by the Compact exclusively with the Tribe. Compact at 17. Part VIII addresses the State's power, through the State Compliance Agency, to monitor the gaming, specifying the terms for the Agency's visits to gaming facilities. Compact at 19.

quo warranto. The Governor contends that this Court lacks jurisdiction because the House does not seek either to remove him from office or to enjoin the future exercise of his authority. We conclude, however, that these are not the only grounds for issuing such a writ.

The Florida Constitution authorizes this Court to issue writs of quo warranto to "state officers and state agencies." Art. V, § 3(b)(8), Fla. Const. The term "quo warranto" means "by what authority." This writ historically has been used to determine whether a state officer or agency has improperly exercised a power or right derived from the State. *See Martinez v. Martinez*, 545 So.2d 1338, 1339 (Fla.1989); *see also* art. V, § 3(b)(8), Fla. Const. Here, the Governor is a state officer. The House challenges the Governor's authority to unilaterally execute the Compact on the State's behalf.

The Governor argues that because he already has signed the Compact, quo warranto relief is inappropriate. But the writ is not so limited. In fact, petitions for the writ historically have been filed after a public official has acted. *See, e.g., Chiles v. Phelps*, 714 So.2d 453, 455 (Fla.1998) (holding that the Legislature and its officers exceeded their authority in overriding the Governor's veto); *State ex rel. Butterworth v. Kenny*, 714 So.2d 404, 406 (Fla.1998) (issuing the writ after the Capital Collateral Regional Counsel had filed a federal civil rights suit, concluding that it had no authority to file it). The Governor's execution of the Compact does not defeat our jurisdiction.

The concurring-in-result-only opinion expresses concern that by considering a more narrow issue than the Governor's authority to execute IGRA compacts in general-that is, whether the Governor has the authority to bind the State to a compact that violates Florida law-we are expanding our quo warranto jurisdiction to include issues normally reserved for declaratory judgment actions. In prior quo warranto cases, however, we have considered separation-of-powers arguments normally reviewed in the context of declaratory judgments, such as whether the Governor's action has usurped the Legislature's power, "where the functions of government would be adversely affected absent an immediate determination by this Court." *Phelps*, 714 So.2d at 457; *see also Martinez*, 545 So.2d at 1339 (holding quo warranto appropriate to test the governor's power to call special sessions); *Orange County v. City of Orlando*, 327 So.2d 7 (Fla.1976) (holding that the legality of city's actions regarding annexation ordinances can be inquired into through quo warranto).

In this case, the Secretary has approved the Compact and, absent an immediate judicial resolution, it will be given effect. In fact, according to news reports, the Tribe already has begun offering blackjack and other games at the Seminole Hard Rock Hotel and Casino. *See* Amy Driscoll, "Casino Gambling: Amid glitz, blackjack's in the cards," The Miami Herald, June 23, 2008, at B1. Thus, if indeed the Governor has exceeded his constitutional authority, a compact that violates Florida law will, nevertheless, become effective in seven casinos located on tribal lands located in the state. As in

Phelps, therefore, the importance and immediacy of the issue justifies our deciding this matter now rather than transferring it for resolution in a declaratory judgment action.

## III. DISCUSSION OF LAW

We now discuss the law that applies to this inter-branch dispute. In deciding whether the Governor or the Legislature has the authority to execute a compact, we first define a "compact" and its historical use in Florida. We then discuss how other jurisdictions have resolved this issue. Next, we review the relevant provisions of our own constitution. Finally, we explain our conclusion that the Governor lacked authority under our state's constitution to execute the Compact because it changes the state's public policy as expressed in the criminal law and therefore infringes on the Legislature's powers.

### A. Compacts and their Use in Florida

A compact is essentially a contract between two sovereigns. *Texas v. New Mexico*, 482 U.S. 124, 128, 107 S.Ct. 2279, 96 L.Ed.2d 105 (1987); *see* Black's Law Dictionary 298 (8th ed.1999) (defining a compact as "[a]n agreement or covenant between two or more parties, esp[ecially] between governments or states"). The United States Supreme Court has described compacts as "a supple device for dealing with interests confined within a region." *State ex rel. Dyer v. Sims*, 341 U.S. 22, 27, 71 S.Ct. 557, 95 L.Ed. 713 (1951). The United States Constitution provides that "[n]o State shall, without the Consent of

Congress ... enter into any Agreement or Compact with another State, or with a foreign Power." U.S. Const, art. I, § 10. IGRA establishes the consent of Congress to execute gaming compacts, but requires federal approval before they become effective. *See* 25 U.S.C. § 2710(d)(8).

Like many states, Florida has executed compacts on a range of subjects, including environmental control, water rights, energy, and education-more than thirty in all. The vast majority were executed with other states. In most cases, the Legislature enacted a law. *See, e.g.*, § 372.831, Fla. Stat. (2007) ("The Wildlife Violator Compact is created and entered into with all other jurisdictions legally joining therein in the form substantially as follows[.]"); § 257.28 (Interstate Library Compact); § 252.921 (Emergency Management Assistance Compact); § 322.44 (Driver License Compact). In others, the Legislature authorized the Governor to execute a compact in the form provided in a statute. *See, e.g.*, § 370.19, Fla. Stat. (2007) ("The Governor of this state is hereby authorized and directed to execute a compact on behalf of the State of Florida with any one or more of [the following states] ... legally joining therein in the form substantially as follows [.]"); § 370.20 (containing the same authorization and establishing the terms for the Gulf States Marine Fisheries Compact); § 403.60 (using the same authorization language for the Interstate Environmental Control Compact, establishing its terms, and "signi[ying] in advance" the Legislature's "approval and ratification of such compact"). In a few-including a compact among the State, the Tribe, and the South Florida Water Management District

regulating water use on Tribal lands-the Legislature by statute approved and ratified the compact. § 285.165, Fla. Stat. (2007). Thus, by tradition at least, it is the Legislature that has consistently either exercised itself or expressly authorized the exercise of the power to bind the State to compacts. We have found no instance in which the governor has signed a compact without legislative involvement.

Although tradition bears some relevance, it does not resolve the question of which branch actually has the constitutional authority to execute compacts in general and gaming compacts in particular. As explained above, the Compact here governs Class III gaming on certain tribal lands in Florida. The issue is whether, regardless of whether the Governor bucked tradition, he had constitutional authority to execute the Compact without the Legislature's prior authorization or, at least, subsequent ratification.

B. How Other Courts Have Answered the Question

Although Florida has not addressed a governor's authority to bind a state to an IGRA compact, other states have. We examine but a few. In *State ex rel. Stephan v. Finney*, 251 Kan. 559, 836 P.2d 1169, 1182 (1992), the governor executed the compact. In deciding his authority to do so, the Kansas Supreme Court examined the "the nature of the obligations undertaken" by the executed IGRA compact. The court noted that many of the compact's provisions were "clearly legislative in nature," such as creating a state agency and assigning new duties to extant state agencies, and concluded that many

provisions "would operate as the enactment of new laws and the amendment of existing laws." *Id.* at 1185. The court therefore held that, although the governor had authority to negotiate the compact, "the Governor ha[d] no power to bind the State to the terms thereof." *Id.*

The New York Court of Appeals has arrived at the same conclusion. After examining IGRA's list of several permissible areas of negotiation for a tribal-state compact, *see* 25 U.S.C. § 1071(d)(3)(C), the court concluded that "these issues necessarily make fundamental policy choices that epitomize 'legislative power.' " *Saratoga County Chamber of Commerce, Inc. v. Pataki*, 100 N.Y.2d 801, 766 N.Y.S.2d 654, 798 N.E.2d 1047, 1060 (2003).[5] Further, like the Kansas

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[5] IGRA lists several permissible subjects for negotiation:
(i) the application of the criminal and civil laws and regulations of the Indian tribe or the State that are directly related to, and necessary for, the licensing and regulation of such activity;

(ii) the allocation of criminal and civil jurisdiction between the State and the Indian tribe necessary for the enforcement of such laws and regulations;

(iii) the assessment by the State of such activities in such amounts as are necessary to defray the costs of regulating such activity;

(iv) taxation by the Indian tribe of such activity in amounts comparable to amounts assessed by the State for comparable activities;

(v) remedies for breach of contract;

(vi) standards for the operation of such activity and maintenance of the gaming facility, including licensing; and

Supreme Court, the court found that the compact's designation of an agency to oversee the gaming and the authority of the agency to promulgate rules "usurped the Legislature's power." 766 N.Y.S.2d at 668, 798 N.E.2d at 1061. The court held that the governor "lack[ed] the power unilaterally to negotiate and execute tribal gaming compacts under IGRA." *Id.*

Applying the test of "whether the Governor's action disrupts the proper balance between the executive and legislative branches," the New Mexico Supreme Court similarly found a gaming compact unduly disruptive of the legislature's powers. *State ex rel. Clark v. Johnson*, 120 N.M. 562, 904 P.2d 11, 23 (1995). The court found that the compact granted extended gaming rights, authorized gaming in contravention of legislative policy, and assigned the roles of the state and the tribe with respect to gaming regulation and civil and criminal jurisdiction. *Id.* at 23-24. Stating that "[r]esidual governmental authority should rest with the legislative branch rather than the executive branch," *id.* at 24, the court held that the "Governor lacked authority under the state Constitution to bind the State by unilaterally entering into the compacts and revenue-sharing agreements in question." *Id.* at 25; *see also Panzer v. Doyle*, 271 Wis.2d 295, 680 N.W.2d 666, 698, 700 (2004) (where a state statute authorized the governor to execute a gaming compact, holding that the governor exceeded his power by permitting the tribes

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(vii) any other subjects that are directly related to the operation of gaming activities.

25 U.S.C. § 2710(d)(3)(C).

to engage in certain games prohibited by state law and to waive state sovereign immunity).

Federal courts, too, have concluded that a state's governor did not have the authority to bind the state to a gaming compact. In *Pueblo of Santa Ana v. Kelly*, 104 F.3d 1546, 1548 (10th Cir.1997), the circuit court held that the Secretary's approval of a compact could not cure an ultra vires act by the state's governor, and the question of "whether a state has validly bound itself to a compact" must be decided under state law. *Id.* at 1557. Noting the New Mexico Supreme Court's "thorough and careful analysis of state law" in Clark, the Tenth Circuit accepted it as determinative on the question of whether its governor had authority to bind the state to the compacts. *Id.* at 1559.

In all these cases, to determine which branch had the authority to bind the state to the compact, courts analyzed the nature and effect of the IGRA compact at issue and compared it to the powers the state constitution delegated to the respective branches. The courts found the compacts within the legislative power because they created or assigned new duties to agencies, conflicted with state law, changed state law, or restricted the legislature's power. Finally, recognizing that state legislative power is limited only by the state and federal constitutions, several courts have ascribed to the legislature, rather than the executive, any residual power on which the state constitutions were silent. *See Clark*, 904 P.2d at 25; *Pataki*, 766 N.Y.S.2d at 668 n. 11, 798 N.E.2d at 1061 n. 11. We now review

our own state constitution in the context of IGRA's provisions and the Compact signed in this case.

### C. Florida Constitutional Provisions

The House contends that several of the Compact's provisions encroach on the Legislature's law- and policy-making powers. To answer the question, we first review the separation-of-powers provisions of the Florida Constitution and our interpretations of it. We then discuss one specific provision on which the Governor relies: the "necessary business" clause.

#### 1. The Florida Constitution's Delegation and Separation of Powers

The Florida Constitution generally specifies the relative powers of the three branches of government. Article II, section 3 provides innocuously that "[t]he powers of the state government shall be divided into legislative, executive and judicial branches. No person belonging to one branch shall exercise any powers appertaining to either of the other branches unless expressly provided herein." In construing our constitution, we have "traditionally applied a strict separation of powers doctrine." *Bush v. Schiavo*, 885 So.2d 321, 329 (Fla.2004) (quoting *State v. Cotton*, 769 So.2d 345, 353 (Fla.2000)).

These provisions are not specific, however. In fact, as we first noted 100 years ago, the state constitution does not exhaustively list each branch's powers. *State v. Atlantic Coast Line R.R. Co.*, 56 Fla. 617, 47 So. 969, 974 (1908). Both the Governor and

the House concede that the state constitution does not expressly grant either branch the authority to execute compacts.

We must therefore expand our analysis beyond the plain language of the constitution. We have held that the powers of the respective branches "are those so defined ... or such as are inherent or so recognized by immemorial governmental usage, and which involve the exercise of primary and independent will, discretion, and judgment, subject not to the control of another department, but only to the limitations imposed by the state and federal Constitutions." *Id.* at 974. A branch has "the inherent right to accomplish all objects naturally within the orbit of that department, not expressly limited by the fact of the existence of a similar power elsewhere or the express limitations in the constitution." *Sun Ins. Office, Ltd. v. Clay*, 133 So.2d 735, 742 (Fla.1961) (quoting *In re Integration of Neb. State Bar Ass'n*, 275 N.W. 265, 266 (1937)). As we noted over seventy-five years ago, what determines whether a particular function is legislative, executive, or judicial "so that it may be exercised by appropriate officers of the proper department" is not "the name given to the function or to the officer who performs it" but the "essential nature and effect of the governmental function to be performed." *Florida Motor Lines v. Railroad Comm'rs*, 100 Fla. 538, 129 So. 876, 881 (1930).

The House argues that, precisely because the state constitution does not expressly grant the governor authority to execute compacts, such authority belongs to the Legislature. In other words, the "residual" power-that is, powers not specifically

assigned to the governor belongs to the Legislature. Albeit many years ago and under different circumstances, we have implied as much. *See State ex rel. Green v. Pearson*, 153 Fla. 314, 14 So.2d 565, 567 (1943) ("The legislative branch looks to the Constitution not for sources of power but for limitations upon power. But if such limitations are not found to exist, its discretion reasonably exercised may not be disturbed by the judicial branch of the government."); *State ex rel. Cunningham v. Davis*, 123 Fla. 41, 166 So. 289, 297 (1936) ("The test of legislative power is constitutional restriction; what the people have not said in their organic law their representatives shall not do, they may do."). And, as we noted above, other state courts have ascribed to their legislatures any residual power on which the state constitutions were silent. *See Clark*, 904 P.2d at 25; *Pataki*, 766 N.Y.S.2d at 668, n. 11, 798 N.E.2d at 1061 n. 11.

We need not decide, however, whether the authority to bind the state to compacts always resides in the legislature. Although the line of demarcation is not always clear, we have noted that "the legislature's exclusive power encompasses questions of fundamental policy and the articulation of reasonably definite standards to be used in implementing those policies." *B.H. v. State*, 645 So.2d 987, 993 (Fla.1994); *see also Askew v. Cross Key Waterways*, 372 So.2d 913, 925 (Fla.1978) (stating that under the nondelegation doctrine, "fundamental and primary policy decisions shall be made by members of the legislature"). Therefore, even if the Governor has authority to execute compacts, its

terms cannot contradict the state's public policy, as expressed in its laws.

2. IGRA and the "Necessary Business" Clause

The Governor argues that his authority to execute the Compact derives from article IV, section 1 of the Florida Constitution. That provision states in part that "[t]he governor shall take care that the laws be faithfully executed ... and transact all necessary business with the officers of government." Art. IV, § 1(a), Fla. Const. The Governor submits that the phrase "transact all necessary business with the officers of government" includes negotiating with the Tribe and that he cannot ignore the federal directive to "negotiate"; therefore, negotiating the Compact was "necessary business" under IGRA.

IGRA provides that a tribe seeking to offer Class III gaming must "request [that] the State ... enter into negotiations" for a compact and that the "State shall negotiate with the Indian tribe in good faith." 25 U.S.C. § 2710(d)(3)(A). The Governor is therefore correct that IGRA requires states to negotiate. As other courts have recognized, however, nowhere does IGRA equate "the state" with "the governor." *See Seminole Tribe*, 517 U.S. at 75 n. 17, 116 S.Ct. 1114 (contrasting IGRA's "repeated[ ] refer[ences] exclusively to 'the State' " with other federal statutes directed at a state's governor and concluding that "the duty imposed by the Act ... is not of the sort likely to be performed by an individual state executive officer or even a group of officers"); *Seminole Tribe*, 11 F.3d at 1029 ("IGRA uniformly addresses itself to 'the State'; not once does it impose

duties or responsibilities on a particular officer of the state (e.g., the governor, the legislature, etc.).").[6] In addition, when a state fails to negotiate, a tribe must sue the state, not the governor. *Seminole Tribe*, 517 U.S. at 74-75, 116 S.Ct. 1114 (holding that Congress intended § 2710(d)(3) to be enforced against the state, not the governor); Seminole Tribe, 11 F.3d at 1029 ("[T]hese suits are not against officials in an attempt to force them to follow federal law.").

More importantly, a State's "duty to negotiate" under IGRA cannot be enforced. A state may avoid its duty, as Florida has effectively done, by asserting its immunity. *Seminole Tribe*, 517 U.S. at 47, 116 S.Ct. 1114. Therefore, although IGRA requires a state to negotiate, it does not impose any duty on a state's governor. Moreover, IGRA does not prescribe the terms of a compact, *see* 25 U.S.C. § 2710(d), and it does not confer on the governor the authority to bind the state to a compact or act in contravention to state law. In other words, IGRA does not grant a governor, or any state actor, any powers beyond those provided by the state's constitution and laws. *See Clark*, 904 P.2d at 26 ("We do not agree that Congress, in enacting the IGRA, sought to invest state governors with powers in excess of those that the governors possess under state law.").

We express no opinion on whether the "necessary business" clause may ever grant the

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[6] IGRA contains a solitary reference to a state's governor in an unrelated section addressing the Secretary's authority to permit gaming on specific lands. *See* 25 U.S.C. § 2719. Congress knew how to refer to a "governor" when it wanted to do so.

governor authority to bind the State to an IGRA compact.[7] We do conclude, however, that the clause does not authorize the governor to execute compacts contrary to the expressed public policy of the state or to create exceptions to the law. Nor does it change our conclusion that "the legislature's exclusive power encompasses questions of fundamental policy and the articulation of reasonably definite standards to be used in implementing those policies." *B.H.*, 645 So.2d at 993.

We now discuss why, in authorizing conduct prohibited by state law, the Governor exceeded his authority.

D. The Compact Violates the Separation of Powers

The House claims that the Compact violates the separation of powers on a number of grounds.[8]

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[7] We note that the Governor relies on *Dewberry v. Kulongoski*, 406 F.Supp.2d 1136 (D.Or.2005), in which Oregon citizens argued that the governor lacked authority to bind the state to an IGRA compact. Despite dismissing the case on procedural grounds, the judge noted that a state constitutional provision conferring authority on the governor to "transact all necessary business with the officers of government" authorized the governor to execute the gaming compact. *Id.* at 1154-55. We do not find this dictum persuasive. *Id.* at 1142.

[8] The House argues that the Compact significantly changes Florida law and policy in a number of ways: it authorizes Class III slot machines outside of Broward County; it allows blackjack and other banked card games that are currently illegal throughout Florida; it provides for collection of funds from tribal casinos for State purposes under a revenue-sharing agreement and penalizes the State for any expansion of non-tribal gaming; it allows an exception to Florida's substantive right of access to

We find one of them dispositive. The Compact permits the Tribe to conduct certain Class III gaming that is prohibited under Florida law. Therefore, the Compact violates the state's public policy about the types of gambling that should be allowed. We hold that, whatever the Governor's authority to execute compacts, it does not extend so far. The Governor does not have authority to agree to legalize in some parts of the state, or for some persons, conduct that is otherwise illegal throughout the state.

We first discuss whether state laws in general, and gaming laws in particular, apply to Indian tribes. We next discuss Florida law on gaming. We then address the House's argument that IGRA prohibits compacts from expanding the gaming allowed under state law. Finally, we explain why the Governor lacked authority to bind the State to a compact, such as this one, that contradicts state law.

1. State Gaming Laws Apply to the Tribe

Generally, state laws do not apply to tribal Indians on Indian reservations unless Congress so provides. *McClanahan v. State Tax Comm'n of Ariz.*,

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public records for information dealing with Indian gaming; it changes the venue of litigation dealing with individual disputes with the tribal casinos; it sets procedures for tort remedies occurring in certain circumstances; it waives sovereign immunity to the extent that it creates enforceable contract rights between the State and the Tribe; and it establishes a regulatory mechanism to be undertaken by the Governor or his designee. Because of our resolution of this case, we need not consider whether these other provisions encroach on the legislature's policy-making authority.

411 U.S. 164, 170, 93 S.Ct. 1257, 36 L.Ed.2d 129 (1973). Therefore, the extent to which a state may enforce its criminal laws on tribal land depends on federal authorization. *See Seminole Tribe of Fla. v. Butterworth*, 658 F.2d 310, 312 (5th Cir.1981). Congress has, however, conferred on the states the authority to assume jurisdiction over crimes committed on tribal land, *see* Act of Aug. 15, 1953, Pub.L. No. 280 § 6, 67 Stat. 588, 590 (1953), and Florida has assumed such jurisdiction. *See* ch. 61-252, §§ 1-2, at 452-53, Laws of Fla. (codified at § 285.16, Fla. Stat. (2007)); *see also* § 285.16(2), Fla. Stat. (2007) ("The civil and criminal laws of Florida shall obtain on all Indian reservations in this state and shall be enforced in the same manner as elsewhere throughout the state."); Op. Att'y Gen. Fla. 94-45 (1994) (discussing the state's jurisdiction over Indian reservations). The state's law is therefore enforceable on tribal lands to the extent it does not conflict with federal law. *See* Op. Att'y Gen. Fla. 94-45 (1994); *see also Hall v. State*, 762 So.2d 936, 936-38 (Fla. 2d DCA 2000) (holding that the circuit court had jurisdiction over a vehicular homicide on an Indian reservation); *State v. Billie*, 497 So.2d 889, 892-95 (Fla. 2d DCA 1986) (holding that a Seminole Indian was properly charged under state criminal law with killing a Florida panther on tribal land). In regard to gambling in particular, federal law provides that, except as provided in a tribal-state compact, state gambling laws apply on tribal lands. *See* 18 U.S.C. § 1166(a) (2000).

Based on these state and federal provisions, what is legal in Florida is legal on tribal lands, and what is illegal in Florida is illegal there. Absent a

compact, any gambling prohibited in the state is prohibited on tribal land.

### 2. Florida's Gaming Laws

It is undisputed that Florida permits limited forms of Class III gaming. The state's constitution authorizes the state lottery, which offers various Class III games, and now permits slot machines in Miami-Dade and Broward Counties. *See* art. X, §§ 7, 15, Fla. Const. For a long time, the State also has regulated pari-mutuel wagering-for example, on dog and horse racing. *See* ch. 550, Fla. Stat. (2007) (governing pari-mutuel wagering).

It is also undisputed, however, that the State prohibits all other types of Class III gaming, including lotteries not sponsored by the State and slot machines outside Miami-Dade and Broward Counties. Florida law distinguishes between nonbanked (Class II) card games and banked (Class III) card games.[9] A "banking game" is one "in which the house is a participant in the game, taking on players, paying winners, and collecting from losers or

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[9] Chapter 849, Florida Statutes (2007), regulates most gaming. It prohibits playing "any game at cards, keno, roulette, faro or other game of chance, at any place, by any device whatever, for money or other thing of value," designating it a second-degree misdemeanor. § 849.08, Fla. Stat. (2007). Certain "penny-ante games" are exempted when "conducted strictly in accordance" with the law. § 849.085, Fla. Stat. (2007) ( " 'Penny-ante game' means a game or series of games of poker, pinochle, bridge, rummy, canasta, hearts, dominoes, or mah-jongg in which the winnings of any player in a single round, hand, or game do not exceed $10 in value.").

in which the cardroom establishes a bank against which participants play." § 849.086(2)(b); *see* § 849.086(1), Fla. Stat. (deeming banked games to be "casino gaming"). Florida law authorizes cardrooms at pari-mutuel facilities for games of "poker or dominoes," but only if they are played "in a nonbanking manner." § 849.086(2), Fla. Stat.; *see* § 849.086(1)-(3). Florida law prohibits banked card games, however. *See* § 849.086(12)(a), (15)(a). Blackjack, baccarat, and chemin de fer are banked card games. They are therefore illegal in Florida.

3. Does IGRA Permit Compacts to Expand Gaming?

Contrary to Florida law, the Compact allows banked card games such as blackjack, baccarat, and chemin de fer. The House argues that the Compact therefore violates IGRA itself, which permits Class III gaming only if the state "permits such gaming for any purpose by any person, organization, or entity." 25 U.S.C. § 2710(d)(1). The Governor, on the other hand, contends that, once state law permits any Class III gaming, a compact may allow all Class III gaming.

The meaning of the phrase "permits such gaming" has been heavily litigated. The question is whether, when state law permits some Class III games to be played, a tribe must be permitted to conduct only those particular games or all Class III games. *See* Kathryn R.L. Rand, *Caught in the Middle: How State Politics, State Law, and State Courts Constrain Tribal Influence Over Indian Gaming*, 90 Marq. L.Rev. 971, 983 (2007) (citing cases). The Secretary's interpretation of this

provision supports the House's argument. *See* Class III Gaming Procedures, 63 Fed.Reg. 3289, 3293 (Jan. 22, 1998) (Proposed Rules) ("IGRA thus makes it unlawful for Tribes to operate particular Class III games that State law completely and affirmatively prohibits."). So do a majority of federal courts. *See, e.g., Rumsey Indian Rancheria of Wintun Indians v. Wilson*, 64 F.3d 1250, 1258 (9th Cir.1994) ("[A] state need only allow Indian tribes to operate games that others can operate, but need not give tribes what others cannot have."); *see also Cheyenne River Sioux Tribe v. South Dakota*, 3 F.3d 273, 279 (8th Cir.1993) (stating that IGRA "does not require the state to negotiate with respect to forms of gaming it does not presently permit"); *but see Lac du Flambeau Band of Lake Superior Chippewa Indians v. Wisconsin*, 770 F.Supp. 480, 486 (W.D.Wis.1991) ("Congress did not intend the term 'permits such gaming' to limit the tribes to the specific types of gaming activity actually in operation in a state."). Our Attorney General has agreed with the majority interpretation. *See* Op. Att'y Gen. Fla.2007-36 at 3 (2007) ("[I]n light of the greater weight of federal case law and the Department of the Interior's interpretation of IGRA, Class III gaming activities subject to mandatory negotiations between a state and an Indian tribe do not include those specifically prohibited by state law.").

Whether the Compact violates IGRA, however, is a question we need not and do not resolve. Given our narrow scope of review on a writ of quo warranto, the issue here is only whether the Florida Constitution grants the Governor the authority to unilaterally bind the State to a compact that violates public policy. We conclude that even if the Governor

is correct that IGRA permits the expansion of gaming on tribal lands beyond what state law permits, such an agreement represents a significant change in Florida's public policy. It is therefore precisely the type of action particularly within the Legislature's power. We now discuss that issue.

### 4. The Compact Violates Florida's Public Policy on Gaming

Article II, section 3 of the Florida Constitution prohibits the executive branch from usurping the powers of another branch. Enacting laws-and especially criminal laws-is quintessentially a legislative function. *See State v. Barquet*, 262 So.2d 431, 433 (Fla.1972) ("The lawmaking function is the chief legislative power."). By authorizing the Tribe to conduct "banked card games" that are illegal throughout Florida-and thus illegal for the Tribe-the Compact violates Florida law. *See Chiles v. Children A, B, C, D, E, & F*, 589 So.2d 260, 264 (Fla.1991) ("This Court has repeatedly held that, under the doctrine of separation of powers, the legislature may not delegate the power to enact laws or to declare what the law shall be to any other branch."). The Governor's action therefore encroaches on the legislative function and was beyond his authority. Nor does it matter that the Compact is a contract between the State and the Tribe. Neither the Governor nor anyone else in the executive branch has the authority to execute a contract that violates state criminal law. *Cf. Local No. 234, United Assoc. of Journeymen & Apprentices of Plumbing & Pipefitting Industry v. Henley & Beckwith, Inc.*, 66 So.2d 818, 821 (Fla.1953) ("[A]n agreement that is violative of a

provision of a constitution or a valid statute, or an agreement which cannot be performed without violating such a constitutional or statutory provision, is illegal and void."); *City of Miami v. Benson*, 63 So.2d 916, 923 (Fla.1953) ("The contract in question, that is, the acceptance by the City of the proposal made by its agent, employee or advisor, to purchase the bonds, is contrary to public policy and is, therefore, void.").

## IV. CONCLUSION

We conclude that the Governor's execution of a compact authorizing types of gaming that are prohibited under Florida law violates the separation of powers. The Governor has no authority to change or amend state law. Such power falls exclusively to the Legislature. Therefore, we hold that the Governor lacked authority to bind the State to a compact that violates Florida law as this compact does. We need not resolve the broader issue of whether the Governor ever has the authority to execute compacts without either the Legislature's prior authorization or, at least, its subsequent ratification. Because we believe the parties will fully comply with the dictates of this opinion, we grant the petition but withhold issuance of the writ.

It is so ordered.

WELLS, ANSTEAD, PARIENTE, and BELL, JJ., concur.

QUINCE, C.J., concurs in result only.

LEWIS, J., concurs in result only with an opinion.

**LEWIS, J., concurring in result only.**

I concur in result only based upon two aspects of the majority opinion which cause concern. First, I would conclude that the majority's analysis and discussion with regard to the Governor's power to enter into a compact is overly restrictive. Second, I question whether the writ of quo warranto is the appropriate remedy for the relief the majority grants today.

## THE CONSTITUTIONAL AUTHORITY OF THE GOVERNOR[10]

I cannot agree with the analysis of the majority, which is unduly restrictive with regard to the constitutional powers of the Governor as the chief executive officer of the State of Florida. The general thrust of the majority opinion indicates that the "necessary business" clause of article IV, section 1(a) of the Florida Constitution does not authorize the Governor to bind the State to an IGRA compact, and the opinion relies upon foreign cases which suggest similar limitations upon the actions of governors in other jurisdictions. I disagree and instead conclude that, if the Compact had not granted and authorized certain types of Class III gaming that are specifically

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[10] Since the majority assumes that we possess quo warranto jurisdiction, I address the merits of this case; however, I am concerned that we may lack quo warranto jurisdiction to address the issue as reframed by the majority.

prohibited by state law, the Governor would have been authorized pursuant to the necessary-business clause to enter into a compact on behalf of the State without either legislative authorization or ratification under the circumstances presented by the instant case. *See Dewberry v. Kulongoski*, 406 F.Supp.2d 1136, 1154 (D.Or.2005) (determining that the execution of a gaming compact was "necessary business" that the governor was authorized to transact under an identical constitutional provision). To the extent the majority suggests otherwise, I disagree.

While I agree that the Governor may not bind the State to a compact that specifically conflicts with existing state law, in my view the constitutional provision does afford the Governor a field of operation to enter into a binding compact under circumstances in which the other branches of government have ignored a problem or neglected to act and have thereby created a void by governmental inaction or a total vacuum in an area that will likely create or produce a negative impact for Florida and the citizens of this State. This power is particularly applicable when that void or vacuum has existed with regard to a known problem or issue for an extensive period of time and adverse consequences are reasonably imminent. Here, despite the fact that this gaming issue existed and the Tribe actively sought to negotiate resolution in a compact for almost sixteen years, the Legislature having full access to the information and issues did not act. In an effort to protect Florida and the citizens of this State from the results of the federal Department's clear statement that it would issue Class III gaming procedures

(under which the State would receive no revenue and possess no control over the Tribe's gaming operations) and the pending legal action, the Governor negotiated a compact. Under these imminent circumstances, the Governor's action constituted "necessary business," which that office was required to address in an attempt to protect the public interest. To hold otherwise would strip the necessary-business clause of any meaningful field of operation. *See Broward County v. City of Ft. Lauderdale*, 480 So.2d 631, 633 (Fla.1985) ("[A] construction of the constitution which renders superfluous, meaningless or inoperative any of its provisions should not be adopted by the courts.").

In my view, the Governor generally possesses the authority to act under a broad range of circumstances where the failure of the other branches of government to act for an extended period of time imminently threatens harm. This may conceivably address matters such as the quality of life, health, or welfare of the citizens of Florida. For example, an emergency that threatens imminent harm to the quality of air or water in Florida may constitute "necessary business" for the Governor depending on the circumstances presented. Further, the Governor is bound by our state Constitution to "take care that the laws be faithfully executed." Art. IV, § 1(a), Fla. Const. In my view, this duty includes the negotiation of inter-sovereign compacts that (1) are consistent with preexisting state law and (2) further the interests of the State of Florida.[11] These

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[11] Through the IGRA, Congress neither claims to nor may it determine who possesses the power to act on behalf of the State

constitutional provisions should be interpreted to afford the Governor the power and authority to negotiate with another sovereign concerning those issues that significantly impact this State and the general well-being of the State even without legislative authorization or ratification under certain circumstances.[12]

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of Florida. The State is not an independent sentient being-it may only act through its officers. The fact that the IGRA consistently refers to "the State" when addressing the negotiation of compacts, does not foreclose state law from enabling the Governor to so negotiate. The issue of who may act on behalf of the State of Florida is an issue of state law, not federal law. Therefore, interpretation of the IGRA's use of the noun "the State" is not a proper means of determining whether the Governor may negotiate and consummate inter-sovereign compacts under the necessary-business clause of the Florida Constitution. *See* art. IV, § 1(a), Fla. Const. *Compare Dewberry*, 406 F.Supp.2d at 1154-55 (finding that the governor was a proper state officer to negotiate and execute an IGRA inter-sovereign compact pursuant to the necessary-business clause of the Oregon constitution), *Langley v. Edwards*, 872 F.Supp. 1531, 1535 (W.D.La.1995) ("IGRA does not specify which branch of state government should negotiate with the Indian Tribe." (emphasis supplied)), *aff'd*, 77 F.3d 479, 1996 WL 46781 (5th Cir.1996), *and Willis v. Fordice*, 850 F.Supp. 523, 527 (S.D.Miss.1994) ("One issue which the IGRA does not address, and which is the ultimate issue in this case, is which branch of a state government should negotiate the Tribal-State compact with the Indian tribe." (emphasis supplied)), *aff'd*, 55 F.3d 633 (5th Cir.1995), with majority op. at 1046-47 & n. 5 ("[N]owhere does IGRA equate 'the state' with 'the governor....' [A]lthough IGRA requires a state to negotiate, it does not impose any duty on a state's governor.... Congress knew how to refer to a 'governor' when it wanted to do so.").

[12] However, such negotiations and the compacts they produce are subject to the dictates of article I, section 10 of the United States Constitution.

## QUO WARRANTO

I have concerns with the manner in which the majority has framed the issue presented by this case because it appears to expand the writ of quo warranto to circumstances in which it was never intended to apply. Historically, this Court has interpreted the writ of quo warranto as a means to challenge the authority or power of a public officer or agency to act in an official capacity. *See, e.g., Martinez v. Martinez*, 545 So.2d 1338, 1339 (Fla.1989) (challenge to the constitutional authority of the Governor to call more than one legislative special session); *State ex rel. Butterworth v. Kenny*, 714 So.2d 404, 406 (Fla.1998) (challenge to the authority of capital collateral regional counsel to file extraneous actions); *State ex rel. Smith v. Jorandby*, 498 So.2d 948, 950 (Fla.1986) (challenge to the authority of public defenders to file actions that do not address an indigent defendant's liberty interest); *State ex rel. Smith v. Brummer*, 443 So.2d 957, 958-59 (Fla.1984) (challenge to the authority of the public defender to accept appointment from federal court to represent defendants during federal habeas-corpus proceedings); *Austin v. State ex rel. Christian*, 310 So.2d 289, 291 (Fla.1975) (challenge to the Governor's authority to assign state attorneys to other circuits). The writ compels a public officer or agency to establish the authority by which it takes official action. *See, e.g., State ex rel. Watson v. City of Holly Hill*, 46 So.2d 498, 499 (Fla.1950) (challenge to the power of a city to levy and collect taxes on lands). Most recently, we have explained:

> Quo warranto is "[a] common-law writ used to inquire into the authority by which a public office is held or a franchise is claimed." Black's Law Dictionary 1285 (8th ed.2004). It is the proper vehicle to challenge the "power and authority" of a constitutional officer, such as the Governor. *Austin v. State ex rel. Christian*, 310 So.2d 289, 290 (Fla.1975).

*Crist v. Fla. Ass'n of Crim. Defense Lawyers*, 978 So.2d 134, 138 n. 3 (Fla.2008).

A number of other jurisdictions have noted that quo warranto is available to address whether a public official is vested with a power under statutory or constitutional law, rather than (1) how that officer exercises those powers which have been granted or (2) the details surrounding such action. *See, e.g., State ex rel. Johnson v. Consumers Pub. Power Dist.*, 143 Neb. 753, 10 N.W.2d 784, 793-94 (1943) ("The general rule is that quo warranto will not lie for a mere irregular exercise of a conferred power although such irregularity may be sufficient when tested by other remedies to vitiate or render void the act done. If the power attaches the manner of its exercise cannot be challenged by information in quo warranto." (emphasis supplied)); *State ex rel. Lommen v. Gravlin*, 209 Minn. 136, 295 N.W. 654, 655 (1941) (quo warranto is improper as a remedy for official misconduct and cannot be employed to test the legality of the official action of public or corporate officers where the underlying power or authority to act exists); *State ex rel. McKittrick v. Murphy*, 347 Mo. 484, 148 S.W.2d 527, 530 (1941) (noting that the writ of quo warranto "is not to be used to prevent an

improper exercise of power lawfully possessed"); *Mora v. Genova*, 1998 WL 89326, *2, 1998 U.S. Dist. Lexis 2258, at *8 (N.D.Ill. Feb. 19, 1998) (unpublished decision) ("Quo warranto is not the proper proceeding to test the Constitutional legality of the official acts of public officers." (emphasis supplied) (citing *People ex rel. Chillicothe Township v. Bd. of Review of Peoria County*, 19 Ill.2d 424, 167 N.E.2d 553, 553 (1960); *City of Highwood v. Obenberger*, 238 Ill.App.3d 1066, 179 Ill.Dec. 65, 605 N.E.2d 1079, 1087 (1992), *appeal denied*, 183 Ill.Dec. 859, 612 N.E.2d 511 (1993))).

The United States Supreme Court has similarly observed that a quo warranto action "must be brought against the person who is charged with exercising an office or authority without lawful right," and that "[t]he possession of power is one thing; the propriety of its exercise in particular circumstances is quite a different thing." *Johnson v. Manhattan Ry. Co.*, 289 U.S. 479, 502, 504, 53 S.Ct. 721, 77 L.Ed. 1331 (1933) (emphasis supplied). A relevant treatise outlines that the claims of public officers to particular powers can be tested in quo warranto, although it is not available to question the validity of acts within that power. *See* 2 Chester J. Antieau, *The Practice of Extraordinary Remedies: Habeas Corpus and the Other Common Law Writs* § 4.03, at 593, § 4.34, at 663 (1987); *see also* 43 Fla. Jur.2d Quo Warranto § 18 ("Quo warranto cannot be used to test the legality of official actions of public or corporate officers.").

Based upon consideration of these proceedings, I have questions with regard to whether we act with

proper jurisdiction. If, as I believe, the Governor possesses the authority and power to negotiate and enter into inter-sovereign compacts and has simply invalidly exercised that authority because there is a contractual term that violates preexisting state law (i.e., the ban on certain types of Class III gaming), it is most questionable whether quo warranto constitutes a proper procedural mechanism to challenge the Governor's actions. Within the context of a petitioner's challenge to the authority of a state officer or agency to act, this Court should only grant a writ of quo warranto where the officer or agency lacks the authority to act, not where the officer or agency has improperly exercised its authority. Other remedies exist and are appropriate under such circumstances.[13] If not so limited, the door has been

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[13] A more appropriate remedy to challenge an allegedly erroneous or legally invalid decision of the Governor or an agency in an authorized capacity could be a declaratory-judgment action. The purpose of such an action is "to afford relief from insecurity and uncertainty with respect to rights, status, and other equitable or legal relations, and it should be liberally construed." *Martinez v. Scanlan*, 582 So.2d 1167, 1170 (Fla.1991) (emphasis supplied) (citing § 86.101, Fla. Stat. (1989)). For example, litigants have used declaratory-judgment actions to challenge the validity of statutes. *See id.*; *see also N. Fla. Women's Health & Counseling Servs. v. State*, 866 So.2d 612, 615 (Fla.2003) (clinics providing abortion services and women's rights organizations sought declaratory judgment that Parental Notice of Abortion Act was unconstitutional). Further, declaratory-judgment actions have been utilized to challenge executive orders issued by the Governor. *See Bass v. Askew*, 342 So.2d 145, 146 (Fla. 1st DCA 1977) (county commissioner sought declaration that executive order of suspension by the Governor was insufficient and Governor lacked the right to amend the order of suspension). Under each circumstance, the plaintiffs challenged the legal correctness of the relevant law or executive order, rather than the authority of either the Legislature to

opened in this Court for judicial examination and questioning of the details of the exercise of that valid power.

In this sense, the common-law writ of quo warranto is analogous to the writ of prohibition (and arguably other extraordinary writs) in that its application should be greatly limited. This Court has held that the writ of prohibition is intended to be " very narrow in scope, to be employed with great caution and utilized only in emergencies." *English v. McCrary*, 348 So.2d 293, 296 (Fla.1977) (emphasis supplied). Further, "[p]rohibition lies to prevent an inferior tribunal from acting in excess of jurisdiction but not to prevent an erroneous exercise of jurisdiction." *Mandico v. Taos Constr.*, 605 So.2d 850, 854 (Fla.1992) (emphasis supplied). Quo warranto is also an extraordinary writ, and therefore the strict interpretation applicable to the writ of prohibition is similarly applicable to this prerogative remedy.

In this case, the House of Representatives and Speaker Rubio clearly understood these limitations upon the writ of quo warranto because they expressly and precisely framed their challenge as whether the Governor possesses the authority vel non to negotiate and enter into any Indian-gaming compact without legislative approval or ratification. *See* Pet. at 6, 28-

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enact the law or the Governor to issue the executive order. Since the majority does not address the question of whether the Governor may enter into a compact, this appears to be a case in which we have chosen to address the legal correctness of the Governor's action instead of his ultimate authority to negotiate and enter into inter-sovereign compacts on behalf of the State.

29 (requesting that this Court "issue a Writ of Quo Warranto to direct the Respondent to justify his authority to bind the State in a Compact with the Seminole Tribe without legislative authorization or ratification, and to issue any order necessary to clarify that the Compact is not binding and enforceable unless and until it is ratified by the Legislature" and "issue a Writ of Quo Warranto declaring that legislative authorization or ratification is necessary for any compact governing gaming on Indian lands to be valid in this State." (emphasis supplied)). Thus, the House and Speaker Rubio challenged the constitutional authority of the Governor to bind the State of Florida to any Indian-gaming compact in the absence of legislative approval or ratification.

In contrast, the majority today reframes the issue as whether the Florida Constitution grants the Governor the authority to bind the State to this Compact, *see* majority op. at 1050, and then relies upon discrete details of this specific Compact to redefine the proffered claim and issue. The majority focuses entirely upon the unlawful nature of one aspect of the Compact rather than addressing the question of whether the Governor possesses the authority to bind the State to any IGRA compact without the approval or ratification of the Legislature. In essence, the majority has created an as-applied constitutional challenge to the specific details of this Compact, thereby avoiding the jurisdictionally based question of whether the Governor possesses the power and authority to enter into any Indian-gaming compact in the absence of legislative endorsement. I do acknowledge

application of the principle of deciding the case as narrowly as possible, but that detail-based analysis opens expanded quo warranto jurisdictional issues.

A question arises with regard to whether the rephrasing of the issue by the majority, along with its resulting decision, has altered this Court's quo warranto jurisdiction and expanded the writ beyond its intended purpose of determining whether the Governor or other state officers and agencies possess the authority or power to act vel non. The majority approaches the position that our quo warranto jurisdiction, and the writ itself, constitute a proper means of challenging either (1) the details surrounding an exercise of authority, or (2) alleged errors in official judgment. However, in circumstances such as these, the proper function of the writ is to provide the petitioner with the ability to challenge the state officer's authority to act without regard to the question of whether the officer properly exercised the authority he or she possesses. Even the cases the majority relies upon in response to my concern involve challenges to the authority of a government official or entity to act, not the details or merits of the matters within the action taken. *See Martinez*, 545 So.2d at 1338 (challenging the authority of the Governor to call more than one special session to discuss the same subject, not the propriety or the wisdom of the subject); *Phelps*, 714 So.2d at 455 (challenging the authority of the Legislature to override a veto, not the merits of the decision to override).[14]

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[14] In *Orange County v. City of Orlando*, 327 So.2d 7 (Fla.1976), the district court decision reviewed by this Court on the basis of

The restructuring of the issue presented by the House and Speaker Rubio causes concern that dissatisfied individuals or entities may seek quo warranto relief whenever a public official or agency acts in a manner which is perceived to be unwise or erroneous. This has never been the objective of the extraordinary writ of quo warranto. Interpreting the writ and affording relief in such a manner leads to the establishment of the writ as a routine avenue through which challenges to allegedly erroneous official acts or judgments may be presented, rather than a means through which the threshold question of whether the officer possesses the power to act is presented. I am concerned that the majority has altered the nature of the extraordinary writ of quo warranto when it applies this remedy to address the details of the actions of the Governor or the Legislature, as opposed to addressing the actual jurisdictionally based question of whether the Governor or the Legislature possesses the authority to act with regard to the challenge presented. *Cf.*

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express and direct conflict involved a challenge by Orange County to the annexation of property by the City of Orlando. *See City of Orlando v. Orange County*, 309 So.2d 16 (Fla. 4th DCA 1975). The Fourth District expressly noted that "[t]he proper method of seeking relief where a municipality has undertaken to exercise jurisdiction or control over land should be through a quo warranto proceeding." *Id.* at 16-17 (quoting *Caldwell v. Losche*, 108 So.2d 295, 296 (Fla. 2d DCA 1959)). However, this Court may only issue writs of quo warranto to state officers and state agencies. *See* Art. V, § 3(b)(8), Fla. Const. Since the availability of the writ in the district and circuit courts is not similarly limited, *see* article V, section 4(b)(3), 5(b), Florida Constitution, the reliance of the majority on *Orange County* to justify its conclusion that quo warranto review is proper here is dubious at best.

*O'Donnell's Corp. v. Ambroise*, 858 So.2d 1138, 1142 (Fla. 5th DCA 2003) (Sawaya, J., specially concurring) ("[T]o allow the use of prohibition in the instant case would, in my view, completely vitiate the limitations placed upon use of the writ and convert it from an extraordinary writ to a commonly used method to appeal any erroneous order."). I am concerned with such a reinvention of the writ of quo warranto. The majority may protest that it has not done so, but its actions undermine those words. Simply saying it does not make it so, and the decisions upon which it relies do not support the statement.

If a court reframes the proceeding as an action challenging the legal correctness of the action of a state officer or agency, rather than the power and authority of the officer or agency to act, the proper procedural device is arguably a declaratory-judgment action, not a petition for writ of quo warranto. *See supra* note 13.[15] Moreover, this Court generally lacks original jurisdiction to consider declaratory-judgment actions. The circuit and county courts are usually the proper forums in which to seek declaratory relief. *Compare* art. V, § 3, Fla. Const., *with* § 86.011, Fla. Stat. (2007); *but see* art. III, § 16(c), Fla. Const. (providing for original declaratory-judgment actions

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[15] The majority claims that the urgency of the instant situation mandates that we resolve this dispute by way of quo warranto. However, we should not permit parties to define this Court's jurisdiction by generating a false emergency. This issue of a compact with the Seminole Tribe has been known for sixteen years. What the majority fails to recognize is that the Legislature created the urgency when it failed to act during those years.

in this Court with regard to legislative-apportionment resolutions).

## CONCLUSION

The jurisdictionally based question framed by the House and Speaker Rubio should be answered. The Governor possesses the authority under the Florida Constitution to enter into Indian-gaming compacts. Here, however, he erroneously exercised that authority because the Compact impermissibly included authorization of Class III gaming specifically prohibited under state law. It is undisputed that the Legislature has acted in this area, and for this reason, I concur in the result of the majority. However, I disagree with the overly restrictive suggestion of the majority and generally conclude that where inaction by the other branches of government for an extended period of time has produced a vacuum under circumstances such as these, the Governor is constitutionally authorized to act under the necessary-business clause to protect the well-being of the State of Florida.

APPENDIX B: Order on Rehearing

SUPREME COURT OF FLORIDA

THURSDAY, SEPTEMBER 11, 2008

CASE NO.: SC07-2154

FLORIDA HOUSE OF REPRESENTATIVES, ET AL.
Petitioner(s)

vs.

HON. CHARLES J. CRIST, JR., ETC.
Respondent(s)

Respondent Governor Charles J. Crist, Jr.'s Motion for Rehearing and Respondent The Seminole Tribe of Florida's Motion for Rehearing are hereby denied.

QUINCE, C.J., and WELLS, ANSTEAD, PARIENTE, and BELL, JJ., and
CANTERO, Senior Justice, concur.
LEWIS, J., dissents.

A True Copy
Test:

_____s/_____
Thomas D. Hall
Clerk, Supreme Court

APPENDIX C: 25 U.S.C. §§ 2701, 2702, 2703(6)-(8), and 2710(d)

25 U.S.C.

Sec. 2701 Findings

The Congress finds that -

(1) numerous Indian tribes have become engaged in or have licensed gaming activities on Indian lands as a means of generating tribal governmental revenue;

(2) Federal courts have held that section 81 of this title requires Secretarial review of management contracts dealing with Indian gaming, but does not provide standards for approval of such contracts;

(3) existing Federal law does not provide clear standards or regulations for the conduct of gaming on Indian lands;

(4) a principal goal of Federal Indian policy is to promote tribal economic development, tribal self-sufficiency, and strong tribal government; and

(5) Indian tribes have the exclusive right to regulate gaming activity on Indian lands if the gaming activity is not specifically prohibited by Federal law and is conducted within a State which does not, as a matter of criminal law and public policy, prohibit such gaming activity.

Sec. 2702. Declaration of policy

The purpose of this chapter is -

(1) to provide a statutory basis for the operation of gaming by Indian tribes as a means of promoting tribal economic development, self-sufficiency, and strong tribal governments;

(2) to provide a statutory basis for the regulation of gaming by an Indian tribe adequate to shield it from organized crime and other corrupting influences, to ensure that the Indian tribe is the primary beneficiary of the gaming operation, and to assure that gaming is conducted fairly and honestly by both the operator and players; and

(3) to declare that the establishment of independent Federal regulatory authority for gaming on Indian lands, the establishment of Federal standards for gaming on Indian lands, and the establishment of a National Indian Gaming Commission are necessary to meet congressional concerns regarding gaming and to protect such gaming as a means of generating tribal revenue.

Sec. 2703. Definitions

For purposes of this chapter –

(6) The term "class I gaming" means social games solely for prizes of minimal value or traditional forms of Indian gaming engaged in by individuals as a part of, or in connection with, tribal ceremonies or celebrations.

(7) (A) The term "class II gaming" means

(i) the game of chance commonly known as bingo (whether or not electronic, computer, or other technologic aids are used in connection therewith) -

(I) which is played for prizes, including monetary prizes, with cards bearing numbers or other designations,

(II) in which the holder of the card covers such numbers or designations when objects, similarly numbered or designated, are drawn or electronically determined, and

(III) in which the game is won by the first person covering a previously designated arrangement of numbers or designations on such cards, including (if played in the same location) pull-tabs, lotto, punch boards, tip jars, instant bingo, and other games similar to bingo, and

(ii) card games that -

(I) are explicitly authorized by the laws of the State, or

(II) are not explicitly prohibited by the laws of the State and are played at any location in the State, but only if such card games are played in conformity with those laws and regulations (if any) of the State regarding hours or periods

of operation of such card games or limitations on wagers or pot sizes in such card games.

(B) The term "class II gaming" does not include

(i) any banking card games, including baccarat, chemin de fer, or blackjack (21), or

(ii) electronic or electromechanical facsimiles of any game of chance or slot machines of any kind.

(C) Notwithstanding any other provision of this paragraph, the term "class II gaming" includes those card games played in the State of Michigan, the State of North Dakota, the State of South Dakota, or the State of Washington, that were actually operated in such State by an Indian tribe on or before May 1, 1988, but only to the extent of the nature and scope of the card games that were actually operated by an Indian tribe in such State on or before such date, as determined by the Chairman.

(D) Notwithstanding any other provision of this paragraph, the term "class II gaming" includes, during the 1-year period beginning on October 17, 1988, any gaming described in subparagraph (B)(ii) that was legally operated on Indian lands on or before May 1, 1988, if the Indian tribe having jurisdiction over the lands on which such gaming was operated requests the State, by no later than the date that is 30 days after October 17, 1988, to negotiate a Tribal-State compact under section 2710(d)(3) of this title.

(E) Notwithstanding any other provision of this paragraph, the term "class II gaming" includes, during the 1-year period beginning on December 17, 1991, any gaming described in subparagraph (B)(ii) that was legally operated on Indian lands in the State of Wisconsin on or before May 1, 1988, if the Indian tribe having jurisdiction over the lands on which such gaming was operated requested the State, by no later than November 16, 1988, to negotiate a Tribal-State compact under section 2710(d)(3) of this title.

(F) If, during the 1-year period described in subparagraph (E), there is a final judicial determination that the gaming described in subparagraph (E) is not legal as a matter of State law, then such gaming on such Indian land shall cease to operate on the date next following the date of such judicial decision.

(8) The term "class III gaming" means all forms of gaming that are not class I gaming or class II gaming.

Sec. 2710. Tribal gaming ordinances

(d) Class III gaming activities; authorization; revocation; Tribal-State compact.

(1) Class III gaming activities shall be lawful on Indian lands only if such activities are—

(A) authorized by an ordinance or resolution that·

(i) is adopted by the governing body of the Indian tribe having jurisdiction over such lands,

(ii) meets the requirements of subsection (b), and

(iii) is approved by the Chairman,

(B) located in a State that permits such gaming for any purpose by any person, organization, or entity, and

(C) conducted in conformance with a Tribal-State compact entered into by the Indian tribe and the State under paragraph (3) that is in effect.

(2) (A) If any Indian tribe proposes to engage in, or to authorize any person or entity to engage in, a class III gaming activity on Indian lands of the Indian tribe, the governing body of the Indian tribe shall adopt and submit to the Chairman an ordinance or resolution that meets the requirements of subsection (b) of this section.

(B) The Chairman shall approve any ordinance or resolution described in subparagraph (A), unless the Chairman specifically determines that—

(i) the ordinance or resolution was not adopted in compliance with the governing documents of the Indian tribe,

or

(ii) the tribal governing body was significantly and unduly influenced in the adoption of such ordinance or resolution by any person identified in section 2711(e)(1)(D)of this title.

Upon the approval of such an ordinance or resolution, the Chairman shall publish in the Federal Register such ordinance or resolution and the order of approval.

(C) Effective with the publication under subparagraph (B) of an ordinance or resolution adopted by the governing body of an Indian tribe that has been approved by the Chairman under subparagraph (B), class III gaming activity on the Indian lands of the Indian tribe shall be fully subject to the terms and conditions of the Tribal-State compact entered into under paragraph (3) by the Indian tribe that is in effect.

(D) (i) The governing body of an Indian tribe, in its sole discretion and without the approval of the Chairman, may adopt an ordinance or resolution revoking any prior ordinance or resolution that authorized class III gaming on the Indian lands of the Indian tribe. Such revocation shall render class III gaming illegal on the Indian lands of such Indian tribe.

(ii) The Indian tribe shall submit any revocation ordinance or resolution described in clause (i) to the Chairman. The Chairman shall publish such ordinance or resolution in the Federal Register and the revocation provided by such ordinance or resolution shall take effect on the date of such publication.

(iii) Notwithstanding any other provision of this subsection—

(I) any person or entity operating a class III gaming activity pursuant to this paragraph on the date on which an ordinance or resolution described in clause (i) that revokes authorization for such class III gaming activity is published in the Federal Register may, during the 1-year period beginning on the date on which such revocation ordinance or resolution is published under clause (ii), continue to operate such activity in conformance with the Tribal-State compact entered into under paragraph (3) that is in effect, and

(II) any civil action that arises before, and any crime that is committed before, the close of such 1-year period shall not be affected by such revocation ordinance or resolution.

(3) (A) Any Indian tribe having jurisdiction over the Indian lands upon which a class III gaming activity is

being conducted, or is to be conducted, shall request the State in which such lands are located to enter into negotiations for the purpose of entering into a Tribal-State compact governing the conduct of gaming activities. Upon receiving such a request, the State shall negotiate with the Indian tribe in good faith to enter into such a compact.

(B) Any State and any Indian tribe may enter into a Tribal-State compact governing gaming activities on the Indian lands of the Indian tribe, but such compact shall take effect only when notice of approval by the Secretary of such compact has been published by the Secretary in the Federal Register.

(C) Any Tribal-State compact negotiated under subparagraph (A) may include provisions relating to—

(i) the application of the criminal and civil laws and regulations of the Indian tribe or the State that are directly related to, and necessary for, the licensing and regulation of such activity;

(ii) the allocation of criminal and civil jurisdiction between the State and the Indian tribe necessary for the enforcement of such laws and regulations;

(iii) the assessment by the State of such activities in such amounts as are necessary to defray the costs of regulating such activity;

(iv) taxation by the Indian tribe of such activity in amounts comparable to amounts assessed by the State for comparable activities;

(v) remedies for breach of contract;

(vi) standards for the operation of such activity and maintenance of the gaming facility, including licensing; and

(vii) any other subjects that are directly related to the operation of gaming activities.

(4) Except for any assessments that may be agreed to under paragraph (3)(C)(iii) of this subsection, nothing in this section shall be interpreted as conferring upon a State or any of its political subdivisions authority to impose any tax, fee, charge, or other assessment upon an Indian tribe or upon any other person or entity authorized by an Indian tribe to engage in a class III activity. No State may refuse to enter into the negotiations described in paragraph (3)(A) based upon the lack of authority in such State, or its political subdivisions, to impose such a tax, fee, charge, or other assessment.

(5) Nothing in this subsection shall impair the right of an Indian tribe to regulate class III gaming on its Indian lands concurrently with the State, except to the extent that such regulation is inconsistent with, or less stringent than, the State laws and regulations made applicable by any Tribal-State compact entered into by the Indian tribe under paragraph (3) that is in effect.

(6) The provisions of section 1175 of Title 15 shall not apply to any gaming conducted under a Tribal-State compact that—

(A) is entered into under paragraph (3) by a State in which gambling devices are legal, and

(B) is in effect.

(7) (A) The United States district courts shall have jurisdiction over—

(i) any cause of action initiated by an Indian tribe arising from the failure of a State to enter into negotiations with the Indian tribe for the purpose of entering into a Tribal-State compact under paragraph (3) or to conduct such negotiations in good faith,

(ii) any cause of action initiated by a State or Indian tribe to enjoin a class III gaming activity located on Indian lands and conducted in violation of any Tribal-State compact entered into under paragraph (3) that is in effect, and

(iii) any cause of action initiated by the Secretary to enforce the procedures prescribed under subparagraph (B)(vii).

(B) (i) An Indian tribe may initiate a cause of action described in subparagraph (A)(i) only after the close of the 180-day period beginning on the date on which the Indian tribe requested the State to enter into negotiations under paragraph (3)(A).

(ii) In any action described in subparagraph (A)(i), upon the introduction of evidence by an Indian tribe that—

(I) a Tribal-State compact has not been entered into under paragraph (3), and

(II) the State did not respond to the request of the Indian tribe to negotiate such a compact or did not respond to such request in good faith, the burden of proof shall be upon the State to prove that the State has negotiated with the Indian tribe in good faith to conclude a Tribal-State compact governing the conduct of gaming activities.

(iii) If, in any action described in subparagraph (A)(i), the court finds that the State has failed to negotiate in good faith with the Indian tribe to conclude a Tribal-State compact governing the conduct of gaming activities, the court shall order the State and the Indian Tribe to conclude such a compact within a 60-day period. In determining in such an action whether a State has negotiated in good faith, the court—

(I) may take into account the public interest, public safety, criminality, financial integrity, and adverse economic impacts on existing gaming activities, and

(II) shall consider any demand by the State for direct taxation of the Indian tribe or of any

Indian lands as evidence that the State has not negotiated in good faith.

(iv) If a State and an Indian tribe fail to conclude a Tribal-State compact governing the conduct of gaming activities on the Indian lands subject to the jurisdiction of such Indian tribe within the 60-day period provided in the order of a court issued under clause (iii), the Indian tribe and the State shall each submit to a mediator appointed by the court a proposed compact that represents their last best offer for a compact. The mediator shall select from the two proposed compacts the one which best comports with the terms of this Act and any other applicable Federal law and with the findings and order of the court.

(v) The mediator appointed by the court under clause (iv) shall submit to the State and the Indian tribe the compact selected by the mediator under clause (iv).

(vi) If a State consents to a proposed compact during the 60-day period beginning on the date on which the proposed compact is submitted by the mediator to the State under clause (v), the proposed compact shall be treated as a Tribal-State compact entered into under paragraph (3).

(vii) If the State does not consent during the 60-day period described in clause (vi) to a proposed compact submitted by a mediator under clause (v), the mediator shall notify the Secretary and the Secretary shall prescribe, in consultation with the Indian tribe, procedures—

(I) which are consistent with the proposed compact selected by the mediator under clause (iv), the provisions of this Act, and the relevant provisions of the laws of the State, and

(II) under which class III gaming may be conducted on the Indian lands over which the Indian tribe has jurisdiction.

(8) (A) The Secretary is authorized to approve any Tribal-State compact entered into between an Indian tribe and a State governing gaming on Indian lands of such Indian tribe.

(B) The Secretary may disapprove a compact described in subparagraph (A) only if such compact violates—

(i) any provision of this Act,

(ii) any other provision of Federal law that does not relate to jurisdiction over gaming on Indian lands, or

(iii) the trust obligations of the United States to Indians.

(C) If the Secretary does not approve or disapprove a compact described in subparagraph (A) before the date that is 45 days after the date on which the compact is submitted to the Secretary for approval, the compact shall be considered to have been approved by the Secretary, but only to the extent the compact is consistent with the provisions of this Act.

(D) The Secretary shall publish in the Federal Register notice of any Tribal-State compact that is approved, or considered to have been approved, under this paragraph.

(9) An Indian tribe may enter into a management contract for the operation of a class III gaming activity if such contract has been submitted to, and approved by, the Chairman. The Chairman's review and approval of such contract shall be governed by the provisions of subsections (b), (c), (d), (f), (g), and (h) of section 2711 of this title.

## APPENDIX D: 18 U.S.C. § 1166

TITLE 18 - CRIMES AND CRIMINAL PROCEDURE

PART I - CRIMES

CHAPTER 53 - INDIANS

**Sec. 1166. Gambling in Indian country**

(a) Subject to subsection (c), for purposes of Federal law, all State laws pertaining to the licensing, regulation, or prohibition of gambling, including but not limited to criminal sanctions applicable thereto, shall apply in Indian country in the same manner and to the same extent as such laws apply elsewhere in the State.

(b) Whoever in Indian country is guilty of any act or omission involving gambling, whether or not conducted or sanctioned by an Indian tribe, which, although not made punishable by any enactment of Congress, would be punishable if committed or omitted within the jurisdiction of the State in which the act or omission occurred, under the laws governing the licensing, regulation, or prohibition of gambling in force at the time of such act or omission, shall be guilty of a like offense and subject to a like punishment.

(c) For the purpose of this section, the term "gambling" does not include –

(1) class I gaming or class II gaming regulated by the Indian Gaming Regulatory Act, or

(2) class III gaming conducted under a Tribal-State compact approved by the Secretary of the Interior under section 11(d)(8)of the Indian Gaming Regulatory Act that is in effect.

(d) The United States shall have exclusive jurisdiction over criminal prosecutions of violations of State gambling laws that are made applicable under this section to Indian country, unless an Indian tribe pursuant to a Tribal-State compact approved by the Secretary of the Interior under section 11(d)(8) of the Indian Gaming Regulatory Act, or under any other provision of Federal law, has consented to the transfer to the State of criminal jurisdiction with respect to gambling on the lands of the Indian tribe.

APPENDIX E: 25 C.F.R. § 502.4

TITLE 25--INDIANS

CHAPTER III--NATIONAL INDIAN GAMING COMMISSION, DEPARTMENT OF THE INTERIOR

PART 502_DEFINITIONS OF THIS CHAPTER

**Sec. 502.4 Class III gaming.**

Class III gaming means all forms of gaming that are not class I gaming or class II gaming, including but not limited to:

(a) Any house banking game, including but not limited to—

(1) Card games such as baccarat, chemin de fer, blackjack (21), and pai gow (if played as house banking games);

(2) Casino games such as roulette, craps, and keno;

(b) Any slot machines as defined in 15 U.S.C. 1171(a)(1) and electronic or electromechanical facsimiles of any game of chance;

(c) Any sports betting and parimutuel wagering including but not limited to wagering on horse racing, dog racing or jai alai; or

(d) Lotteries.

APPENDIX F: *Seminole Tribe of Florida v. Chiles*, No. 97-014171 (Broward County Circuit Court, Dec. 18, 1998)

IN THE CIRCUIT COURT OF THE
SEVENTEENTH JUDICIAL CIRCUIT
IN AND FOR BROWARD COUNTY, FLORIDA

CASE NO.: 97-014171

January 4, 1999

SEMINOLE TRIBE OF FLORIDA,
Plaintiff,

vs.

LAWTON CHILES, Governor of
the State of Florida
Defendants.

AGREED ORDER GRANTING
SUMMARY JUDGMENT

This cause came before the Court upon Plaintiff Seminole Tribe's Motion for Summary Judgment, and the Court, having received memoranda of counsel, and having heard argument and agreements between counsel and being otherwise fully advised in the premises, it is

ORDERED AND ADJUDGED

That the Motion for Summary Judgment is granted. The instant ticket vending machines used by the Florida Lottery, as described in the Amended Complaint and the Motion for Summary Judgment constitute machines under Section 849.16 Florida Statutes. The games depicted on video tape, Exhibit "A" to the Complaint, constitute games which, if conducted by any person, organization or entity, other than the lottery, would constitute gambling in violation of Florida Statute Section 849.01.

DONE AND ORDERED in Fort Lauderdale, Broward County, Florida, this 18th day of December, 1998.

_____s/_____
John A Frusciante, Circuit Judge

Copies Furnished Counsel

APPENDIX G: Excerpt of Compact Between the Seminole Tribe of Florida and the State of Florida

Part III. Definitions

E. "Covered Game" or "Covered Gaming Activity" means the following Class III gaming activities:

> 1. (a) Slot machines, meaning any mechanical or electrical contrivance, terminal that may or may not be capable of downloading slot games from a central server system, machine, or other device that, upon insertion of a coin, bill, ticket, token, or similar object or upon payment of any consideration whatsoever, including the use of any electronic payment system, except a credit card or debit card, is available to play or operate, the play or operation of which, whether by reason of skill or application of the element of chance or both, may deliver or entitle the person or persons playing or operating the contrivance, terminal, machine, or other device to receive cash, billets, tickets, tokens, or electronic credits to be exchanged for cash or to receive merchandise or anything of value whatsoever, whether the payoff is made automatically from the machine or manually. The term includes associated

equipment necessary to conduct the operation of the contrivance, terminal, machine, or other device. Slot machines may use spinning reels, video displays, or both.

(b) If at any time, State law authorizes the use of electronic payments systems utilizing credit or debit card payment for the play or operation of slot machines for any person, the Tribe shall be authorized to use such payment systems.

2. Any banking or banked card game, including baccarat, chemin de fer, and blackjack (21);

3. High stakes poker games, as provided in Part V., Section L; and

4. Any devices or games that are authorized under State law to the Florida State Lottery, provided that the Tribe will not offer such games through the Internet unless others in the State are permitted to do so.

5. Any new game authorized by Florida law for any person for any purpose.

Except as provided in Section 5 above, nothing in this definition provides the Tribe the ability to conduct roulette, craps, roulette-styled games, or craps-styled games; however, nothing herein is intended to prohibit the Tribe from operating slot

machines that employ video displays of roulette, wheels or other table game themes.

**APPENDIX H: Federal Register Notice of Approved Compact**

(Notice of Deemed Approved Tribal-State Class III Gaming Compact, 73 Fed. Reg. 1229 (Jan. 7, 2008))

**DEPARTMENT OF THE INTERIOR**
**Bureau of Indian Affairs**
**Indian Gaming**

**AGENCY:** Bureau of Indian Affairs, Interior.

**ACTION:** Notice of Deemed Approved Tribal–State Class III Gaming Compact.

**SUMMARY:** This notice publishes the Deemed Approved Compact between the Seminole Tribe of Florida and the State of Florida.

**EFFECTIVE DATE:** January 7, 2008.

**FOR FURTHER INFORMATION CONTACT:** George T. Skibine, Director, Office of Indian Gaming, Office of the Deputy Assistant Secretary—Policy and Economic Development, Washington, DC 20240, (202) 219–4066.

**SUPPLEMENTARY INFORMATION:** Under Section 11 of the Indian Gaming Regulatory Act of 1988 (IGRA) Public Law 100–497, 25 U.S.C. 2710, the

Secretary of the Interior shall publish in the Federal Register notice of approved Tribal–State compacts for the purpose of engaging in Class III gaming activities on Indian lands. The compact authorizes the Seminole Tribe to operate slot machines, any banking or banked card game, poker, any devices or games that are authorized under State law to Florida State lottery and any new game authorized by Florida law. The term of the compact is 25 years. The Assistant Secretary—Indian Affairs, Department of the Interior, through his delegated authority, is publishing notice that the Compact between the Seminole Tribe of Florida and the State of Florida is now in effect.

Dated: December 31, 2007.

Carl J. Artman,
*Assistant Secretary—Indian Affairs.*

[FR Doc. E7–25628 Filed 1–4–08; 8:45 am]

BILLING CODE 4310–4N–P

APPENDIX I: Chart of IGRA Tribal-State Compacts by Expiration Date*

* The data contained in this chart was obtained from the National Indian Gaming Commission website at http://www.nigc.gov/ReadingRoom/Compacts, as well as from the websites of the appropriate State Gaming Commissions. All Compacts noted below contain specific expiration dates. Not listed below are approximately 100 IGRA Compacts that can be classified as as "Subject to Modification" because they do not contain a concrete expiration date and may be terminated, renegotiated, or modified by various methods according to the terms of each individual Compact. Compacts that are Subject to Modification affect Tribes located in some of the States noted below as well as in Connecticut, Iowa, Idaho, Kansas, Minnesota, Mississippi, Oregon, and Washington.

| Tribe | Expiration Date |
|---|---|
| Reno-Sparks Indian Colony, NV | 2009 |
| Stockbridge Munsee Community, WI | 2009 |
| Turtle Mountain Band of Chippewa Indians, ND | 2009 |
| Flandreau Santee Sioux Tribe, SD | 2010 |
| Eastern Band of Cherokee Indians, NC | 2011 |
| Standing Rock Sioux Tribe, SD | 2011 |
| Three Affiliated Tribes of the Fort Berthold Reservation, MT | 2012 |

| | |
|---|---|
| Walker River Paiute Tribe, NV | 2012 |
| Ak Chin Indian Community, AZ | 2013 |
| Bay Mills Indian Community, MI | 2013 |
| Grand Traverse Band of Ottawa/Chippewa Indians, MI | 2013 |
| Hannahville Indian Community, MI | 2013 |
| Keweenaw Bay Indian Community, MI | 2013 |
| Lac Vieux Desert Band of Lake Superior Chippewa Indians, MI | 2013 |
| Saginaw Chippewa Indian Tribe, MI | 2013 |
| Salt River Pima-Maricopa Indian Community, AZ | 2013 |
| San Carlos Apache Tribe, AZ | 2013 |
| San Juan Southern Paiute Tribe, AZ | 2013 |
| Sault Ste. Marie Tribe of Chippewa Indians, MI | 2013 |
| Tohono O'odham Nation, AZ | 2013 |
| Tonto Apache Tribe, AZ | 2013 |
| White Mountain Apache Tribe, AZ | 2013 |
| Yavapai Apache Nation, AZ | 2013 |
| Yavapai-Prescott Tribe, AZ | 2013 |
| Winnebago Tribe of Nebraska, NE | 2014 |
| Jicarilla Apache Nation, NM | 2015 |
| Mescalero Apache Tribe, NM | 2015 |
| Navajo Nation, AZ | 2015 |
| Pueblo of Acoma, NM | 2015 |
| Pueblo of Nambe, NM | 2015 |
| Pueblo of Picuris, NM | 2015 |
| Pueblo of Pojoaque, NM | 2015 |
| Tunica-Biloxi Tribe of Louisiana, | 2015 |

| | |
|---|---|
| LA | |
| Seneca Nation of New York, NY | 2016 |
| Northern Cheyenne Tribe, MT | 2017 |
| Huron Potawatomi, Inc., MI | 2019 |
| Little Traverse Bay Bands of Odawa Indians, MI | 2019 |
| Pokagon Band of Potawatomi Indians of Michigan, MI | 2019 |
| Absentee Shawnee Tribe of Indians of Oklahoma, OK | 2020 |
| Alturas Indian Rancheria, CA | 2020 |
| Apache Tribe of Oklahoma, OK | 2020 |
| Arapahoe Tribe of the Wind River Reservation, WY | 2020 |
| Augustine Band of Cahuilla Mission Indians, CA | 2020 |
| Barona Group of Capitan Grande Band of Mission Indians, CA | 2020 |
| Bear River Band of the Rohnerville Rancheria, CA | 2020 |
| Berry Creek Rancheria of Maidu Indians, CA | 2020 |
| Big Sandy Rancheria of Mono Indians, CA | 2020 |
| Big Valley Band of Pomo Indians, CA | 2020 |
| Blue Lake Rancheria, CA | 2020 |
| Cabazon Band of Mission Indians, CA | 2020 |
| Cachil DeHe Band of Wintun Indians of the Colusa Indian Community, CA | 2020 |
| Caddo Nation of Oklahoma, OK | 2020 |
| Cahuilla Band of Mission Indians, | 2020 |

| | |
|---|---|
| CA | |
| Campo Band of Diegueno Mission, CA Indians | 2020 |
| Chemehuevi Indian Tribe of the Chemehuevi Reservation, CA | 2020 |
| Cher-Ae Heights Indian Community of the Trinidad Rancheria, CA | 2020 |
| Cherokee Nation ofOklahoma, OK | 2020 |
| Cheyenne and Arapaho Tribes of Oklahoma, OK | 2020 |
| Chickasaw Nation, OK | 2020 |
| Chicken Ranch Rancheria of Me-Wuk Indians, CA | 2020 |
| Choctaw Nation of Oklahoma, OK | 2020 |
| Citizen Potawatomi Nation, OK | 2020 |
| Comanche Nation, OK | 2020 |
| Delaware Nation, OK | 2020 |
| Dry Creek Rancheria of Pomo Indians, CA | 2020 |
| Eastern Shawnee Tribe of Oklahoma, OK | 2020 |
| Elem Indian Colony of Pomo Indians, CA | 2020 |
| Elk Valley Rancheria, CA | 2020 |
| Ewiiaapaayp Band of Kumeyaay Indians | 2020 |
| Ft. Sill Apache Tribe of Oklahoma, OK | 2020 |
| Hoopa Valley Tribe, CA | 2020 |
| Hopland Band of Pomo Indians, CA | 2020 |
| Iowa Tribe of Oklahoma, OK | 2020 |
| Jackson Rancheria Band of Me- | 2020 |

| | |
|---|---|
| wuk Indians, CA | |
| Jamul Indian Village, CA | 2020 |
| Kaw Nation, OK | 2020 |
| Kickapoo Tribe of Oklahoma, OK | 2020 |
| La Jolla Band of Luiseno Mission Indians, CA | 2020 |
| Manchester Band of Pomo Indians, CA | 2020 |
| Manzanita Band of Diegueno Mission Indians, CA | 2020 |
| Miami Tribe of Oklahoma, OK | 2020 |
| Miami and Modoc Tribes of Oklahoma, OK | 2020 |
| Middletown Rancheria of Pomo Indians of California, CA | 2020 |
| Modoc Tribe of Oklahoma, OK | 2020 |
| Mooretown Rancheria of Maidu Indians, CA | 2020 |
| Muscogee (Creek) NationM OK | 2020 |
| Osage Tribe, OK | 2020 |
| Otoe-Missouria Tribe of Indians, OK | 2020 |
| Ottawa Tribe of Oklahoma, OK | 2020 |
| Paiute-Shoshone Indians of the Bishop Community, CA | 2020 |
| Paskenta Band of Nomlaki Indians, CA | 2020 |
| Pawnee Nation of Oklahoma, OK | 2020 |
| Peoria Tribe of Indians of Oklahoma, OK | 2020 |
| Picayune Rancheria of the Chukchansi Indians, CA | 2020 |
| Pit River Tribe, CA | 2020 |
| Ponca Tribe of Indians of | 2020 |

| | |
|---|---|
| Oklahoma, OK | |
| Quapaw Tribe of Indians, OK | 2020 |
| Resighini Rancheria, CA | 2020 |
| Rincon Band of Luiseno Mission Indians, CA | 2020 |
| Robinson Rancheria of Pomo Indians, CA | 2020 |
| Sac & Fox Nation of Oklahoma, OK | 2020 |
| San Pasqual Band of Diegueno Mission Indians, CA | 2020 |
| Santa Rosa Indian Community, CA | 2020 |
| Santa Ynez Band of Chumash Mission Indians, CA | 2020 |
| Seminole Nation of Oklahoma, OK | 2020 |
| Seneca-Cayuga Tribe of Oklahoma, OK | 2020 |
| Sherwood Valley Rancheria, CA | 2020 |
| Smith River Rancheria, CA | 2020 |
| Soboba Band of Luiseno Mission Indians, CA | 2020 |
| Susanville Indian Rancheria, CA | 2020 |
| Table Mountain Rancheria, CA | 2020 |
| Tonkawa Tribe of Indians of Oklahoma, OK | 2020 |
| Tule River Indian Tribe of the Tule River Reservation, CA | 2020 |
| Twenty Nine Palms Band of Mission Indians, CA | 2020 |
| Wichita and Affiliated Tribes, OK | 2020 |
| Wyandotte Nation, OK | 2020 |
| Tuolumne Band of MeWuk Indians, CA | 2022 |

| | |
|---|---|
| La Posta Band of Diegueno Mission Indians, CA | 12/31/2024 |
| Santa Ysabel Band of Diegueno Mission Indians of the Santa Ysabel Reservation, CA | 12/31/2024 |
| Torres-Martinez Band of Cahuilla Mission Indians, CA | 12/31/2024 |
| Buena Vista Rancheria of Mi-Wuk Indians, CA | 2025 |
| Coyote Valley Band of Pomo Indians, CA | 2025 |
| Fort Mojave Indian Tribe of AZ, CA, and NV, CA | 2025 |
| Quechan Tribe of the Fort Yuma Indian Reservation, CA | 2025 |
| Yurok Tribe of the Yurok Reservation, CA | 2025 |
| Shingle Springs Band of Miwok Indians. CA | 2029 |
| Agua Caliente Band of Cahuilla Indians, CA | 2030 |
| Forest County Potawatomi Community, WI | 2030 |
| Morongo Band of Cahuilla Mission Indians, CA | 2030 |
| Pala Band of Luisseno Mission Indians, CA | 2030 |
| Pauma Band of Luiseno Mission Indians of the Pauma & Yuima Reservation, CA | 2030 |
| Pechanga Band of Luiseno Mission Indians, CA | 2030 |
| Rumsey Indian Rancheria of Wintun Indians, CA | 2030 |

| | |
|---|---|
| San Manuel Band of Serrano Mission Indians, CA | 2030 |
| Sycuan Band of the Kumeyaay Nation, CA | 2030 |
| United Auburn Indian Community of Auburn Rancheria, CA | 2030 |
| Viejas Band of Kumeyaay Indians, CA | 2030 |
| Ho-Chunk Nation, WI | 2033 |
| Pueblo of Isleta, NM | 2037 |
| Pueblo of Laguna, NM | 2037 |
| Ohkay Owingeh Pueblo , NM | 2037 |
| Pueblo of San Felipe, NM | 2037 |
| Pueblo of Sandia, NM | 2037 |
| Pueblo of Santa Ana, NM | 2037 |
| Pueblo of Santa Clara, NM | 2037 |
| Pueblo of Taos, NM | 2037 |
| Pueblo of Tesuque, NM | 2037 |

117 (2)

No. 08-746

Supreme Court, U.S.
FILED
JAN 26 2009
OFFICE OF THE CLERK

IN THE
**Supreme Court of the United States**

SEMINOLE TRIBE OF FLORIDA,
*Petitioner*,
v.
FLORIDA HOUSE OF REPRESENTATIVES AND
MARCO RUBIO,
*Respondents*.

**On Petition for Writ of Certiorari to the Florida Supreme Court**

# RESPONDENT'S BRIEF IN OPPOSITION

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## QUESTION PRESENTED

Whether the Florida Supreme Court violated the Indian Commerce Clause and the Supremacy Clause of the United States Constitution by holding that the Governor of Florida lacked authority to enter into a tribal-state compact without the Florida Legislature's approval when the compact allowed gaming that the court found violated state law?

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## OPINION BELOW

The opinion of the Florida Supreme Court, *Florida House of Representatives v. Crist*, is reproduced in the Petitioner's Appendix ("Pet. App.") at 1a-44a and is reported at 990 So. 2d 1035 (Fla. 2008).

## STATEMENT OF THE CASE

The Governor of Florida, without the Florida Legislature's approval, executed a compact (the "Compact") with the Seminole Tribe of Florida (Petitioner) to allow Class III gaming under the Indian Gaming Regulatory Act (IGRA) on Petitioner's Indian lands located within the State of Florida. Class III gaming includes slot machines and "banked" card games in which participants play against the house. 25 U.S.C. § 2703(6)-(8) (2000). IGRA permits Class III gaming on Indian lands only if it is: (1) authorized by tribal ordinance, (2) "located in a State that permits such gaming for any purpose by any person, organization, or entity," and (3) "conducted in accordance with a Tribal-State compact entered into by the Indian tribe and the State ... that is in effect." *Id.* § 2710(d)(1).

In relevant part, the Compact authorized Petitioner to conduct several types of Class III gaming that are illegal in Florida, including any banked card games like baccarat, blackjack, and *chemin de fer*. The Florida House of Representatives and its Speaker, Marco Rubio, filed a petition for writ of quo warranto with the Florida Supreme Court disputing the Governor's authority to bind the State to the Compact without legislative authorization or ratification. The court allowed Petitioner to join the action as a

respondent.

The Florida Supreme Court held, on narrow grounds, that the Governor could not unilaterally bind the State to a compact that violated state law. Petitioner requested rehearing, arguing that the court applied an improper test as to what gaming is permissible on Petitioner's Indian lands under IGRA; Petitioner also sought rehearing on the basis that state law permitted the Florida Lottery to operate certain games that were equivalent to the Class III games permitted under the Compact. Petitioner's motion for rehearing was denied.

## REASONS FOR DENYING THE PETITION

Petitioner seeks review of a decision of the Florida Supreme Court, which applied state separation of powers principles in holding that Florida's Governor cannot unilaterally bind the State to a gaming compact that violates state law, finding as a matter of state law that banked card games are illegal in Florida. Petitioner contends that this holding violates the Indian Commerce Clause and the Supremacy Clause of the United States Constitution. The issue presented does not warrant this Court's review for two reasons: (I) the case involves only a state law matter; and (II) no conflict exists on a point of federal law.

### I. Petitioner Seeks Review of a State Court Decision That Resolves Matters of State Law Pertaining Only to the Branches of State Government.

The case at issue decided only matters of state law, thereby making it a poor candidate for this Court's review. The issue below was the power of the Governor to execute the Compact without prior authority or ratification by the Legislature, and the relief sought was a declaration that the Governor lacked such power. The Florida Supreme Court's decision on this issue was based exclusively on state law:

> the Governor's execution of a compact authorizing types of gaming that are prohibited under Florida law violates the separation of powers. The Governor has no authority to change or amend state law.

> Such power falls exclusively to the Legislature. Therefore, we hold that the Governor lacked authority to bind the State to a compact that violates Florida law as this compact does. We need not resolve the broader issue of whether the Governor ever has the authority to execute compacts without either the Legislature's prior authorization or, at least, its subsequent ratification.

*Crist*, 990 So. 2d at 1050-51; Pet. App. at 30a. The court's decision was grounded in state law separation of powers principles and was necessarily based on the court's interpretation of Florida law prohibiting the banked card games included in the Compact. *Id.* at 1047-48.

This Court has consistently held that "state courts are the ultimate expositors of state law," and it will deviate from this rule only in "extreme circumstances." *Mullaney v. Wilbur*, 421 U.S. 684, 691 (1975). None of the extreme circumstances that the Court has noted in the past is present here. *See generally* E. Gressman, K. Geller, et al., *Supreme Court Practice* 142-146 (9th ed. 2007) (discussing extreme circumstances).

The disputed question of state law arose in a proceeding under the Florida Supreme Court's original jurisdiction to issue writs of quo warranto, which extends "to state officers and state agencies." Art. V, § 3(8), Fla. Const. Petitioner was not a necessary party to the dispute, and the Florida Supreme Court made no

determination on any of Petitioner's claimed rights under a federal statute or the United States Constitution. The Florida Supreme Court did nothing more than decide disputed issues of state law. This decision involves only a state law matter and leaves federal law undisturbed, thereby making certiorari jurisdiction inappropriate.

## II. The Florida Supreme Court's Decision Does Not Conflict with Circuit Decisions Interpreting Federal Law.

Petitioner argues that the Florida Supreme Court's decision conflicts with the Second, Eighth, and Ninth Circuits' interpretations of IGRA section 2710. Pet. 7-8 (citing *Mashantucket Pequot Tribe v. Connecticut*, 913 F.2d 1024 (2d Cir. 1990); *United States v. Sisseton-Wahpeton Sioux Tribe*, 897 F.2d 358 (8th Cir. 1990); *Rumsey Indian Rancheria of Wintun Indians v. Wilson*, 64 F.3d 1250 (9th Cir. 1994)). None of the cited cases, however, involved the only issue decided by the Florida Supreme Court (i.e., whether a state's governor can unilaterally bind a state to a compact that violates state law). None presents a conflict with each other or with the Florida Supreme Court's decision. Instead, Petitioner's cases discuss the scope of gaming permitted under IGRA, an issue not presented in this proceeding.

Indeed, to the extent that *Rumsey* has application here, it is not helpful to Petitioner. There, the tribes advocated a broad reading of IGRA that would have forced the state to permit all forms of Class III gaming when the state allows similar, but not the same, gaming to be operated in the state. *Id.* at 1256. The court,

however, applied a more narrow construction, finding that a "state need only allow Indian tribes to operate games that others can operate, but need not gives tribes what others cannot have." *Id.* at 1258.

Petitioner's arguments regarding the operations of the Florida Lottery are akin to the broad reading of IGRA advocated and rejected in *Rumsey*. Pet. 10. Petitioner alleges that the Legislature allowed the Florida Lottery to operate the same games it seeks to operate on its land; therefore, IGRA requires the State to negotiate and enter into a compact with it. Specifically, Petitioner contends that the Florida Supreme Court did not consider these arguments and that this omission conflicts with *California v. Cabazon Band of Mission Indians*, which holds that applicable state laws must be examined before they are characterized as prohibitory. 480 U.S. 202, 211 n.10 (1987).

While the Florida Supreme Court did not mention the Florida Lottery in its opinion, it did specifically hold that state law prohibits the games Petitioner sought to operate under the Compact, thereby tacitly rejecting Petitioner's claim. *Crist*, 990 So. 2d at 1049; Pet. App. at 30a; Tribe's Response Brief at 33-34 (making arguments regarding Florida Lottery). Petitioner raised these arguments again in its motion for rehearing, Pet. at 6, which the court denied. Pet. App. 45a. The only reasonable conclusion is that the court considered these arguments and found them to be meritless.

Petitioner also contends that this Court is not bound by the Florida Supreme Court's factual findings

regarding the Florida Lottery under *Stein v. New York*, 346 U.S. 156, 181 (1953). Even if a factual error existed (which is not shown here), this case is not one of those rare instances for which certiorari might be appropriate under Rule 10 ("A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings."). Indeed, this Court is in no better position to make factual determinations regarding the operations of Florida's Lottery than the Florida Supreme Court, which exercised its original jurisdiction below in reviewing the petition for writ of quo warranto.

Notably, Petitioner fails to cite the one circuit case most applicable here, *Pueblo of Santa Ana v. Kelly*, 104 F.3d 1546 (10th Cir. 1997). In that case, the governor signed compacts with various tribes after the state supreme court found that he lacked the authority to do so, suggesting that state law did not permit the kind of gaming that the tribes were conducting. *Id.* at 1548. The Secretary of the Interior, following IGRA's requirements, approved the compacts and published notice in the Federal Register.[1] *Id.* at 1550.

The Tenth Circuit explained that IGRA has two requirements for a Class III gaming compact: the "compact must be validly entered into by the state and the tribe, and it must be in effect pursuant to

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[1] The Secretary of the Interior published notice of his default approval of the Compact prior to the Florida Supreme Court's decision. *See Notice of Deemed Approved Tribal-State Class III Gaming Compact*, 73 Fed. Reg. 229 (Jan. 7, 2008).

Secretarial approval." *Id.* at 1557. The court found that the "plain language of IGRA makes it clear that Secretarial approval and publication places a compact 'into effect.' IGRA, however, says nothing specific about how we determine whether a state and tribe have entered into a valid compact. *State law must determine whether a state has validly bound itself to a compact.*" *Id.* at 1557-58 (emphasis added) (citing *Washington v. Confederated Bands and Tribes of the Yakima Indian Nation*, 439 U.S. 463, 493 & n.39 (1979)).

As in *Pueblo of Santa Ana*, the court below applied state law to determine whether the state has validly bound itself to a Class III gaming compact. The Tenth Circuit left open the question of whether a federal court must independently decide whether the state validly bound itself to a compact under state law or whether the federal courts must abide by the highest court of the state's determination of the issue. Instead, the court accepted as determinative the state supreme court's decision because the opinion was well founded. 104 F.3d 1559. Likewise, this Court need not answer this question here due to its deference to the decision of a state court on state law. *Mullaney*, 421 U.S. at 691. As in *Pueblo of Santa Ana*, the decision below was well reasoned, going no further than was necessary to reach its holding that Florida's Governor cannot unilaterally bind the state to a compact that violates state law.

Finally, Petitioner makes three points for this Court's review that are unpersuasive. First, Petitioner argues that the Florida Supreme Court's decision is based on an error of federal law regarding state jurisdiction over gaming conducted on Indian land. It

claims the court misapplied IGRA because Florida law allegedly permits that type of gaming that was the subject of the Compact. Pet. 13. Petitioner's view is that Florida had to negotiate with it under IGRA. Pet. 16. But IGRA does not require a state to negotiate over gaming that state law prohibits. *Rumsey*, 64 F.3d at 1260. In any event, the issue in this case is not the scope of a state's obligation to negotiate under IGRA; rather, the issue is whether a state's governor has the unilateral authority to agree to a Class III gaming compact that includes otherwise illegal gaming. Finally, the decision of this Court in *Seminole Tribe of Florida v. Florida*, 516 U.S. 44 (1996), precludes any lawsuit involving a state's alleged failure to negotiate with a Tribe as required by IGRA.

Second, Petitioner contends that the Governor's execution of the Compact neither intrudes upon legislative authority nor changes the public policy of Florida. Petitioner argues that the Governor has performed a typical executive function. Pet. 17. The Florida Supreme Court disagreed with this policy argument because it found that Florida law prohibits the type of gaming permitted under the Compact. Pet. 20. For support, Petitioner primarily relies on *Lac Courte Oreilles Band v. Wisconsin*, 367 F.3d 650 (7th Cir. 2004), which addressed an IGRA provision that allows the Secretary of the Interior to take land into trust for gaming purposes but a governor can veto the acquisition. *Id.* at 653-54. The question was one of federal law, not an analysis of the governor's authority under state law. IGRA grants no authority to governors in the compacting process. The statute says the State shall negotiate a Class III gaming compact in good faith.

but leaves the definition of who speaks for the State to state law. 25 U.S.C. § 2710 (3)(d)(3)(A) (2000).

Third, Petitioner argues that federal law limits state legislative authority regarding gaming conducted on Indian lands. But the Florida Supreme Court's opinion does not seek to regulate activities on Indian lands – all such regulation is preempted and can be done by the State only pursuant to the terms of a Class III gaming compact. 18 U.S.C. § 1166 (2000).

In summary, because the issue below was a question of state law this Court should not grant review. Likewise, because the Florida Supreme Court's decision does not conflict with the various federal appellate court decisions cited and comports with the principles of IGRA, the Indian Commerce Clause, and the Supremacy Clause, no basis for review exists.

## CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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